HE GENERAL STATUTES OF NORTH CAROLINA

1979 SUPPLEMENT

Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers

Under the Direction of
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Volume 1C

1978 Replacement

Annotated through 297 N.C. 304 and 41 N.C. App. 192. For complete scope of annotations, see scope of volume page.

Place in Pocket of Corresponding Volume of Main Set.

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Preface

This Supplement to Replacement Volume 1C contains the general laws of a permanent nature enacted at the First and Second 1977 Sessions and the First 1979 Session of the General Assembly which are within the scope of such volume, and brings to date the annotations included therein.

Amendments of former laws are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings. Editors' notes point out many of the chapters effected by the amendatory acts.

Chapter analyses show all sections except catchlines carried for the purpose of notes only. An index to all statutes codified herein appears in Replacement Volumes 4B, 4C and 4D.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed. All legislation appearing herein became effective upon ratification, unless noted to the contrary in an editor's note or an effective date note.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P. O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the First and Second 1977 Sessions and the First 1979 Session of the General Assembly affecting Chapters 157 through 168 of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through volume 297, p. 304.
North Carolina Court of Appeals Reports through volume 41, p. 192.
Federal Reporter 2nd Series through volume 597, p. 283.
Federal Supplement through volume 469, p. 738.
Federal Rules Decision through volume 81, p. 262.
United States Reports through volume 438, p. 783.
Supreme Court Reporter through volume 99.
North Carolina Law Review.
Wake Forest Intramural Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

The General Statutes of North Carolina
1979 Supplement

VOLUME 1C

Chapter 15.

Criminal Procedure.

ARTICLE 1.

General Provisions.

§ 15-10.2. Mandatory disposition of detainers — request for final disposition of charges; continuance; information to be furnished prisoner.

Compliance with Section Required. — A defendant cannot claim the benefits afforded by this section without complying with its terms. State v. McKoy, 294 N.C. 134, 240 S.E.2d 383 (1978).

Oral requests for trial made by defendant's counsel to the district attorney were not sufficient to entitle defendant to a dismissal under the provisions of subsection (a) of this section. State v. McKoy, 33 N.C. App. 304, 235 S.E.2d 98, cert. denied, 293 N.C. 256, 237 S.E.2d 538 (1977).

Applied in State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977).

Cited in State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

ARTICLE 2.

Record and Disposition of Seized, etc., Articles.

§ 15-11.1. Seizure, custody and disposition of articles; exceptions. — (a) If a law-enforcement officer seizes property pursuant to lawful authority, he shall safely keep the property under the direction of the court or magistrate as long as necessary to assure that the property will be produced at and may be used as evidence in any trial. Upon application by the lawful owner or a person, firm or corporation entitled to possession or upon his own determination, the district attorney may release any property seized pursuant to his lawful authority if he determines that such property is no longer useful or necessary as evidence in a criminal trial and he is presented with satisfactory evidence of ownership. If the district attorney refuses to release such property, the lawful owner or a person, firm or corporation entitled to possession may make application to the court for return of the property. The court, after notice to all parties, including the defendant, and after hearing, may in its discretion order any or all of the property returned to the lawful owner or a person, firm or corporation entitled to possession. The court may enter such order as may be necessary to assure that the evidence will be available for use as evidence at the time of trial, and will otherwise protect the rights of all parties. Notwithstanding any other provision of law, photographs or other identification or analyses made of the property may be introduced at the time of the trial provided that the court determines that the introduction of such substitute evidence is not likely to substantially prejudice the rights of the defendant in the criminal trial.

(1979, c. 593.)

Editor's Note. — The 1979 amendment, effective October 1, 1979, substituted the present second, third and fourth sentences of subsection (a) for the former second sentence, which read: "Upon application to the court by the lawful owner or a person, firm, or corporation entitled to possession, after notice to all parties, including the defendant, and after hearing, the court may in its discretion order any or all of the property returned to the lawful owner or person, firm, or corporation entitled to possession."

As subsections (b) and (c) were not changed by the amendment, they are not set out.

ARTICLE 4A.

Administrative Search and Inspection Warrants.

§ 15-27.2. Warrants to conduct inspections authorized by law.

(e) Any warrant issued under this section for a search or inspection shall be valid for only 24 hours after its issuance, must be personally served upon the owner or possessor of the property between the hours of 8:00 A.M. and 8:00 P.M. and must be returned within 48 hours. If the owner or possessor of the property

is not present on the property at the time of the search or inspection and reasonable efforts to locate the owner or possessor have been made and have failed, the warrant or a copy thereof may be affixed to the property and shall have the same effect as if served personally upon the owner or possessor.

(1979, c. 729.)

Editor's Note. —

The 1979 amendment, effective July 1, 1979, added the second sentence of subsection (e).

As the rest of the section was not changed by the amendment, only subsection (e) is set out.

Constitutionality. — Subdivision (c)(1) of this section is not unconstitutionally void for vagueness. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656 (1979).

Warrant Protects Employer's Fourth Amendment Rights. — A warrant showing that a specific business has been chosen for an Occupational Safety and Health Act search on the basis of a general administrative plan for the enforcement of the act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656 (1979).

The statutory scheme for obtaining a warrant to conduct an administrative inspection, when complied with, provides ample protections against the constitutional proscription of general warrants. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656 (1979).

Neutral Application of Inspection Program. — It is necessary for the agency to make a showing to the magistrate, or clerk, that the general administrative plan for enforcement is being applied on a neutral basis as to the particular establishment to be inspected. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698 (1979).

Alternative Criteria for Basis of Warrant. — Subdivision (c)(1) of this section creates two alternative criteria for determining whether to issue a warrant. The first, the "program of inspection test," is that the property is to be inspected as part of a legally authorized program of inspection which naturally includes that property. The second is a probable cause test. If an inspection meets either of these tests a warrant is properly issued under the statute. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698 (1979).

The requirement of subdivision (c)(1) of this section that the property is to be inspected "as part of a legally authorized program of inspection which naturally includes that property" comports with the criterion that a specific business has been chosen for an Occupational Safety and Health Act search on the basis of a general administrative plan for the enforcement of the act derived from neutral sources. In light of the United States Supreme Court decisions, the statute must be interpreted as also requiring a showing to the magistrate that the general administrative plan for enforcement is based upon "reasonable legislative or administrative standards." Interpreted in this way, subdivision (c)(1) of this section requires a sufficient showing of probable cause and is constitutional. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698 (1979).

Sufficiency of Affidavit. — The "program of inspection" test under subdivision (c)(1) of this section requires the agent seeking the warrant to provide facts in an affidavit showing that a particular business has been selected for inspection pursuant to an administrative plan containing specific neutral criteria. The affidavit to support issuance of a warrant under this standard must contain an adequate description of the general administrative plan, the specific neutral criteria used to determine which businesses will be inspected under the plan, and facts showing why the particular business sought to be inspected comes within the plan. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656 (1979).

Where no facts from which the issuing officer could determine whether probable cause existed were included in the affidavit on which the administrative warrant was obtained, the affidavit was insufficient to support the issuance of an administrative search warrant. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698 (1979).

The inclusion of the underlying facts in the affidavit is necessary to make the warrant procedure meaningful. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698 (1979).

Conclusory allegations by the affiant, which are nothing more than a perfunctory restatement of the statutory language contained in subdivision (c)(1) of this section, are insufficient to meet the statutory requirements. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656 (1979).

The rule that the sufficiency of a search warrant should properly be determined with reference to the supporting affidavits is applicable in the context of administrative inspection warrants. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656 (1979).

Probable Cause Standards. — While subdivision (c)(1) of this section sets forth standards for issuance of an administrative search warrant which are less stringent than the probable cause standards required in the criminal law sense under § 15A-246, these standards are certainly sufficient to guarantee that a decision to search private property is justified by a reasonable governmental interest. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656 (1979).

For purposes of an administrative search, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656 (1979).

An Occupational Safety and Health Act agent's entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656 (1979).

The "probable cause" standard permits an Occupational Safety and Health Act agent to obtain a warrant where he has specific evidence in an affidavit showing that conditions in violation of OSHA exist on the premises. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656 (1979).

The attempt to show through statistics that an inspection of the business would be likely to reveal Occupational Safety and Health Act violations is not sufficient to meet the "probable cause" test under the statute. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656 (1979).

Warrant Improperly Granted. — Where there was no showing from which a magistrate could have independently determined (1) that there existed a legally authorized program of inspection which naturally included the property, (2) that the general administrative plan for enforcement was based upon reasonable legislative or administrative standards, and (3) that the administrative standards were being applied to plaintiff on a neutral basis, the warrant was improperly granted. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698 (1979).

Inspection Warrant Is Not General Warrant. — A warrant to conduct an administrative inspection issued pursuant to this section could in no sense be considered a general warrant. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656 (1979).

The requirements for warrant procedures set out in State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972), a criminal case, apply equally to the issuance of administrative inspection warrants, since the purpose of a warrant in either case is to provide for a determination of probable cause by a neutral officer. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698 (1979).

ARTICLE 7.

Fugitives from Justice.

§ 15-48. Outlawry for felony.

Editor's Note. —
For survey of 1976 case law on constitutional law, see 55 N.C.L. Rev. 965 (1977).

ARTICLE 11.

Forfeiture of Bail.

§§ 15-110 to 15-124: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 15.

Indictment.

§ 15-144. Essentials of bill for homicide.

Accused's County of Residence Is Not Element of Murder. — This section states it is not necessary to allege matter not required to be proved on the trial. Defendant's county of residence is not an element of murder and not required to be proved at trial. State v. Carswell, 40 N.C. App. 752, 253 S.E.2d 635 (1979).

Nature of Malice Aforethought. — The term "malice aforethought," which is used in an indictment conforming to this section cannot be held to import into the definition [of first degree murder] the element of premeditation or deliberation. Indeed, it is rather definitely indicated that it relates rather to the prior existence of the malice which motivates the murder than to a previously entertained purpose. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

Killing with Malice, etc. —

An indictment drawn in accordance with this section is sufficient to sustain a verdict of guilty of murder in the first degree based upon a finding that defendant killed with malice, premeditation and deliberation, or that defendant killed in the perpetration or attempted perpetration of any arson, rape, robbery, burglary or other felony. State v. May, 292 N.C. 644, 235 S.E.2d 178 (1977).

Allegation of Premeditation and Deliberation Is Not Required. — By virtue of this section premeditation and deliberation do not have to be alleged in an indictment for first degree murder. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

Bill of Particulars. —

In accord with original. See State v. May, 292 N.C. 644, 235 S.E.2d 178 (1977).

Cited in State v. Foster, 293 N.C. 674, 239 S.E.2d 449 (1977); State v. Smith, 294 N.C. 365, 241 S.E.2d 674 (1978); State v. Freeman, 295 N.C. 210, 244 S.E.2d 680 (1978); State v. Connley, 295 N.C. 327, 245 S.E.2d 663 (1978); State v. Ford, 297 N.C. 144, 254 S.E.2d 14 (1979).

§ 15-144.1. Essentials of bill for rape. — (a) In indictments for rape it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the offense of rape was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing rape to allege that the accused person unlawfully, willfully, and feloniously did ravish and carnally know the victim, naming her, by force and against her will and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for rape in the first degree and will support a verdict of guilty of rape in the first degree, rape in the second degree, attempted rape or assault on a female.

(b) If the victim is a female child under the age of 12 years it is sufficient to allege that the accused unlawfully, willfully, and feloniously did carnally know and abuse a child under 12, naming her, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for the rape of a female child under the age of 12 years and all lesser included offenses.

(c) If the victim is a person who is mentally defective, mentally incapacitated, or physically helpless it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did carnally know and abuse a person who was mentally defective, mentally incapacitated or physically helpless, naming such victim, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law for the rape of a mentally defective, mentally incapcitated or physically helpless person and all lesser included offenses. (1977, c. 861, s. 1; 1979, c. 682, s. 10.)

Editor's Note. — The 1979 amendment, effective January 1, 1980, deleted "assault with intent to commit rape" following "rape in the second degree" near the end of subsection (a), deleted "virtuous" preceding "female child" and preceding "child under 12" in the first sentence of subsection (b) and preceding "female child" in the second sentence of subsection (b) and added subsection (c).

Session Laws 1979, c. 682, ss. 13 and 14, provide:

"Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1979] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws 1979, c. 682, s. 12, contains a severability clause.

For a survey of 1977 criminal law, see 56 N.C.L. Rev. 965 (1978).

Allegations of Every Element of Offense Are Not Required. — Prior to the enactment of this section it was necessary that an indictment for rape contain allegations of every element of the offense. This section, in which the legislature explicitly states that "[i]n indictments for rape it is not necessary to allege every matter required to be proved on the trial," eliminates that requirement. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

This section complies with the constitutional requirement that the defendant be informed of the accusation against him even though it eliminates the requirement that the indictment contain allegations of every element of the offense. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

This section, enacted after the 1973 revision of former § 14-21 which divided rape into degrees, authorizes an indictment for first degree rape which omits averments (1) that the offense was perpetrated with a deadly weapon or by inflicting serious bodily injury or (2) that the defendant's age is greater than sixteen, two elements the proof of which were essential to a conviction for first degree rape. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

In enacting this section the legislature prescribed a new form of indictment for rape. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

The short-form indictment for homicide in § 15-144 is the model upon which this section was drafted. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

§ 15-144.2. Essentials of bill for sex offense. — (a) In indictments for sex offense it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the sex offense was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing a sex offense to allege that the accused person unlawfully, willfully, and feloniously did engage in a sex offense with the victim, naming the victim, by force and against the will of such victim and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for a first degree sex offense and will support a verdict of guilty of a sex offense in the first degree, a sex offense in the second degree, an attempt to commit a sex offense or an assault.

(b) If the victim is a person of the age of 12 years or less, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child of 12 years or less, naming the child, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for a sex offense against a child of the age of 12 years or less and all lesser included offenses.

(c) If the victim is a person who is mentally defective, mentally incapacitated, or physically helpless it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a person who was mentally defective, mentally incapacitated or physically helpless, naming such victim, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law for

a sex offense against a mentally defective, mentally incapacitated or physically helpless person and all lesser included offenses. (1979, c. 682, s. 11.)

Editor's Note. — Session Laws 1979, c. 682, ss. 13 and 14, provide:

"Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1979] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws 1979, c. 682, s. 12, contains a severability clause.

§ 15-153. Bill or warrant not quashed for informality.

II. GENERAL EFFECT.

Plain, Intelligible, etc. —

In accord with 10th paragraph in original. See State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

Indictment and warrants need only allege the ultimate facts constituting each element of the criminal offense. Evidentiary matters need not be alleged. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

Following Words, etc. —

An indictment couched in the language of the statute is generally sufficient to charge the statutory offense. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

Charging Use of Deadly Weapon. — It is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would necessarily demonstrate the deadly character of the weapon. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

§ 15-155. Defects which do not vitiate.

When Time, etc. —

In accord with 2nd paragraph in original. See State v. Locklear, 33 N.C. App. 647, 236 S.E.2d 376, cert. denied, 293 N.C. 363, 237 S.E.2d 851 (1977).

Applied in State v. Tesenair, 35 N.C. App. 531, 241 S.E.2d 877 (1978).

Cited in State v. Guffey, 39 N.C. App. 359, 250 S.E.2d 96 (1979).

ARTICLE 16.

Trial before Justice.

§ 15-159: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 17.

Trial in Superior Court.

§ 15-166. Exclusion of bystanders in trial for rape and sex offenses. — In the trial of cases for rape and of or a sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case. (1907, c. 21; C. S., s. 4636; 1973, c. 1141, s. 14; 1979, c. 682, s. 3.)

Editor's Note. — The 1979 amendment, effective January 1, 1980, substituted "or a sex offense or attempt to commit rape or attempt to commit a sex offense" for "assault with the intent to commit rape"near the beginning of the section. The language of the section as set out above follows literally the direction of the 1979 amendatory act.

Session Laws 1979, c. 682, ss. 13 and 14, provide:

"Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1980] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws 1979, c. 682, s. 12, contains a severability clause.

§ 15-169. Conviction of assault, when included in charge. — On the trial of any person for any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character. (1885, c. 68; Rev., s. 3268; C. S., s. 4639; 1979, c. 682, s. 4.)

Editor's Note. — The 1979 amendment, effective January 1, 1980, deleted "rape, or" preceding "any felony" near the beginning of the section.

Session Laws 1979, c. 682, ss. 13 and 14, provide:

"Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1980] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws 1979, c. 682, s. 12, contains a severability clause.

The necessity for instructing the jury, etc. — The trial court should instruct the jury on a lesser included offense when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. State v. Mayberry, 38 N.C. App. 509, 248 S.E.2d 402 (1978).

Stated in State v. Craig, 35 N.C. App. 547, 241 S.E.2d 704 (1978).

§ 15-170. Conviction for a less degree or an attempt.

Necessity for instructing jury, etc. — The trial court should instruct the jury on a lesser included offense when and only when there is evidence from which the jury could find

that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. State v. Mayberry, 38 N.C. App. 509, 248 S.E.2d 402 (1978).

The greater crime includes the lesser, so that where an offense is alleged in an indictment, and the jury acquits as to that one, it may convict of the lesser offense when the charge is inclusive of both offenses. State v. Craig, 35 N.C. App. 547, 241 S.E.2d 704 (1978).

§ 15-173. Demurrer to the evidence.

Effect of Defendant Introducing Testimony at Trial. —

In accord with lst paragraph in original. See State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978).

When Motion Denied. —

When the evidence is considered in the light most favorable to the State, if there is substantial evidence, whether direct, circumstantial, or both, of all material elements of the offense charged, then the motion for nonsuit must be denied, and it is then for the jury to determine whether the evidence establishes guilt beyond a reasonable doubt. State v. Williams, 38 N.C. App. 138, 247 S.E.2d 630 (1978), cert. denied, 296 N.C. 108, 249 S.E.2d 807 (1979).

Sufficiency of Evidence. —

In accord with 30th paragraph in original. See State v. Williams, 38 N.C. App. 138, 247 S.E.2d 630 (1978), cert. denied, 296 N.C. 108, 249 S.E.2d 807 (1979).

In accord with 34th paragraph in original. See State v. Haywood, 295 N.C. 709, 249 S.E.2d 429 (1978).

Upon defendant's motion to dismiss, or for judgment of nonsuit, the evidence for the State must be taken as true and the question for the court is whether there is substantial evidence that the offense charged in the bill of indictment, or a lesser offense included therein, has been committed, and that the defendant committed it. State v. Burke, 36 N.C. App. 577, 244 S.E.2d 477 (1978).

Applied in State v. Correll, 38 N.C. App. 451, 248 S.E.2d 451 (1978); State v. Rhyne, 39 N.C. App. 319, 250 S.E.2d 102 (1979).

Cited in State v. Hensley, 294 N.C. 231, 240 S.E.2d 332 (1978).

§ 15-173.1: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15-174: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 17A.

Informing Jury in Case Involving Death Penalty.

§ 15-176.4. Instruction to jury on consequences of guilty verdict.

Editor's Note. — For survey of 1976 case law on criminal procedure, see 55 N.C.L. Rev. 989 (1977).

ARTICLE 17B.

Informing Jury of Possible Punishment upon Conviction.

§ 15-176.9. Loss of motor vehicle driver's license.

Editor's Note. — For survey of 1976 case law on criminal procedure, see 55 N.C.L. Rev. 989 (1977).

ARTICLE 18.

Appeal.

§§ 15-179 to 15-186: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 19A.

Credits against the Service of Sentences and for Attainment of Prison Privileges.

§ 15-196.1. Credits allowed. — The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole and probation revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject. (1973, c. 44, s. 1; 1977, c. 711, s. 16A; 1977, 2nd Sess., c. 1147, s. 30.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1147, s. 30, effective July 1, 1978, amended Session Laws 1977, c. 711, by adding thereto a new s. 16A, amending this section. The amendment substituted "The minimum and maximum term of a" for "The term of a determinate sentence or the minimum and maximum term of an indeterminate" at the beginning of the section.

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Applied in State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

§ 15-196.2. Allowance in cases of multiple sentences.

Applied in State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

§ 15-196.3. Effect of credit.

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Application to Re-Sentencing. — A person who was initially, and unconstitutionally, sentenced to death, and is re-sentenced to life imprisonment is entitled to receive credit for pre-trial custody provided in this section. Carey v. Garrison, 452 F. Supp. 485 (W.D.N.C. 1978).

§ 15-196.4. Procedures for judicial award.

Cited in State v. Mason, 295 N.C. 584, 248 S.E.2d 241 (1978).

ARTICLE 20.

Suspension of Sentence and Probation.

§§ 15-197 to 15-200.1: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15-200.2: Repealed by Session Laws 1975, c. 309, s. 2, effective July 1, 1975.

Cross Reference. — For provisions as to post-trial relief, effective July 1, 1978, see §§ 15A-1411 through 15A-1422.

Editor's Note. — This section was again repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

§ 15-205. Duties and powers of the probation officers.

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Authority to Arrest Probationer Without Warrant. — If a simple conclusory statement from the probation officer, containing no factual allegations, is sufficient to permit another officer to arrest a probationer without a

warrant, then it is reasonable to conclude that this section and § 15A-1345 read together, give the probation officer the authority to arrest a probationer under his supervision for violations of conditions of probation without a warrant or other written document. State v. Waller, 37 N.C. App. 133, 245 S.E.2d 808 (1978).

§ 15-205.1: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 22.

Review of Criminal Trials.

§§ 15-217 to 15-222: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 23.

Expunction of Records.

§ 15-223. Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor. — (a) Whenever any person who has not yet attained the age of 18 years and has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States, the laws of this State or any other state, pleads guilty to or is guilty of a misdemeanor other than a traffic violation, he may file a petition in the court where he was convicted for expunction of the misdemeanor from his criminal record. The petition cannot be filed earlier than two years after the date of the conviction or any period of probation, whichever occurs later, and the petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner than he has been of good behavior for the two-year period since the date of conviction of the misdemeanor in question and has not been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States or the laws of this State or any other state.
(2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives and that his character and reputation are good.
(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.
(4) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was

convicted and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the misdemeanor in question or during the two-year period following that conviction.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the two-year period that he deems desirable.

(1979, c. 431, ss. 1, 2.)

Editor's Note. —

The 1979 amendment rewrote subdivision (a)(4) and added the last paragraph of subsection (a).

§ 15-224. Expunction of records when charges are dismissed or there are findings of not guilty. — Except as otherwise provided in G.S. 90-96, if any person is charged with a crime, either a misdemeanor or a felony, and the charge is dismissed, or a finding of not guilty is entered, that person may apply to the court of the county where the charge was brought for an order to expunge from all official records any entries relating to his apprehension or trial. The court shall hold a hearing on the application and, upon finding that at the time any of the proceedings against him occurred the person had not attained the age of 18 years and had not previously been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States, this State, or any other state, the court shall order the expunction. No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of his failure to recite or acknowledge any expunged entries concerning apprehension or trial. The clerk shall send a copy of the expunction order to any public official known to be a custodian of such entries. (1979, c. 61.)

Chapter 15A.

Criminal Procedure Act.

SUBCHAPTER I. GENERAL.

ARTICLE 1.

Definitions and General Provisions.

§ 15A-101. Definitions.

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 3.

Venue.

§ 15A-131. Venue generally.

The right to be tried in the county where the charged crime allegedly occurred is statutorily based, and is not a right grounded in the federal or State Constitutions. State v. Hood, 294 N.C. 30, 239 S.E.2d 802 (1978).

§ 15A-133. Waiver of venue; motion for change of venue; indictment may be returned in other county.

Cited in State v. Hood, 294 N.C. 30, 239 S.E.2d 802 (1978).

§ 15A-135. Allegation of venue conclusive in absence of timely motion.

Former Statute. —
The purpose of former § 15-134 was to forestall the possibility that a criminal offender would escape punishment merely because of uncertainty as to the county in which the crime was committed. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

Burden of Proof Is on State. — This section, like former § 15-134, is silent concerning the burden of proof with regard to proper venue. Hence, the common law controls and the burden of proof is upon the State to show that the offense occurred in the county named in the bill of indictment. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

But Venue Need Not Be Shown beyond Reasonable Doubt. — Venue need not be shown beyond a reasonable doubt, since it does not affect the question of a defendant's guilt or the power of the court to try him. Proof of venue by a preponderance of the evidence is sufficient. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

§ 15A-136. Venue for sexual offenses. — If a person is transported by any means, with the intent to violate any of the provisions of Article 7A of Chapter 14 (§ 14-27.1 et seq.) of the General Statutes and the intent is followed by actual violation thereof, the defendant may be tried in the county where transportation was offered, solicited, begun, continued or ended. (1979, c. 682, s. 2.)

Editor's Note. — Session Laws 1979, c. 682, ss. 13 and 14, provide:

"Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1979] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws 1979, c. 682, s. 12, contains a severability clause.

§§ 15A-137 to 15A-140: Reserved for future codification purposes.

SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES.

ARTICLE 9.

Search and Seizure by Consent.

§ 15A-221. General authorization; definition of "consent."

Editor's Note. — For article discussing the search and seizure provisions of Chapter 15A, see 52 N.C.L. Rev. 277 (1973).

An officer's threat to impound defendant's car if he would not consent to a search of the car did not constitute duress and negate the voluntary character of defendant's consent to search, since the officer had the legal right to impound the car, where the officer had probable cause to search. State v. Paschal, 35 N.C. App. 239, 241 S.E.2d 92 (1978).

Use of Evidence Obtained in Search by Consent. — Evidence obtained pursuant to the search of an automobile with the permission of the one in possession is competent against him and the occupants. State v. Jefferies, 41 N.C. App. 95, 254 S.E.2d 550 (1979).

§ 15A-222. Person from whom effective consent may be obtained.

Consent by Person in Possession, etc. — In accord with original. See State v. Jefferies, 41 N.C. App. 95, 254 S.E.2d 550 (1979).

A tenant in possession of the premises is a person entitled to give consent to a search of the premises under subdivision (3) of this section. State v. Reagan, 35 N.C. App. 140, 240 S.E.2d 805 (1978).

The lessee of an apartment was a person authorized to give consent to a search of the premises. State v. McNeill, 33 N.C. App. 317, 235 S.E.2d 274 (1977).

§ 15A-223. Permissible scope of consent search and seizure.

Failure to comply with § 15A-223(b) has no constitutional significance within the meaning of § 15A-974(1). State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

ARTICLE 10.

Other Searches and Seizures.

§ 15A-231. Other searches and seizures.

Editor's Note. — For article discussing the search and seizure provisions of Chapter 15A, see 52 N.C.L. Rev. 277 (1973).

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

Warrant Not Required Where Article Seized Is in Plain View. — This section incorporated

the United States Supreme Court "plain view" exception to the warrant requirement, which permits inclusion in evidence of the fruit of a legal, warrantless presence. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

But plain view alone is not enough to justify warrantless seizure of evidence. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Under § 15A-253, the statutory "plain view" doctrine is limited to the inadvertent discovery of items pursuant to a legal search under a valid warrant though these items are not specified in the search warrant. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Constitutionally permissible seizures under the "plain view" exception to the Fourth Amendment protection against warrantless searches and seizures have been restricted under § 15A-253 to those instances where the officer has legal justification to be at the place where he inadvertently sees a piece of evidence in plain view. The doctrine serves to supplement the prior justification. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

The search of an automobile, etc. —

Warrantless searches of automobiles and seizures of contraband therefrom without consent are not per se regulated by the North Carolina General Statutes. State v. Summerlin, 35 N.C. App. 522, 241 S.E.2d 732 (1978).

A warrantless search of a vehicle capable of movement out of the location or jurisdiction may be conducted by officers when they have probable cause to search and exigent circumstances make it impracticable to secure a search warrant. State v. Summerlin, 35 N.C. App. 522, 241 S.E.2d 732 (1978).

Property Which May Be Taken, etc. —

In order to justify the seizure of a weapon as being incident to a lawful arrest it is not necessary that the weapon be on the person being arrested. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Items Uncovered during Search Pursuant to Warrant. — Where a lawful search pursuant to a search warrant is being conducted, items uncovered during the course of this search may be seized if the items would have been seizable under previously announced rationales for warrantless, plain view seizures (i.e., the items were the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime, or were items for which probable cause existed to believe that they were evidence of criminal activity and would aid in a particular apprehension or conviction), and the items are discovered "inadvertently." State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

The meaning of the inadvertence requirement is that there must be no intent on the part of investigators to search for and seize the contested items not named in the warrant. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

ARTICLE 11.

Search Warrants.

§ 15A-241. Definition of search warrant.

Editor's Note. —

For article discussing the search and seizure provisions of Chapter 15A, see 52 N.C.L. Rev. 277 (1973).

§ 15A-242. Items subject to seizure under a search warrant.

Editor's Note. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

Provisions of chapter 15A, particularly this section and § 15A-253, are codifications of federal constitutional requirements. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

§ 15A-243. Who may issue a search warrant.

Determination of Probable Cause. — The determination of the existence of probable cause is not concerned with the question of whether the offense charged has been committed in fact, or whether the accused is guilty or innocent, but only with whether the affiant has reasonable grounds for his belief. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250 (1979).

If the apparent facts set out in an affidavit for a search warrant are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a search warrant. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250 (1979).

Probable cause does not mean actual and positive cause, nor does it import absolute certainty. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250 (1979).

Within the meaning of this section through 15A-245, probable cause may be defined as a reasonable ground to believe that the proposed search will reveal the presence, upon the premises to be search, of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250 (1979).

Cited in State v. Summerlin, 35 N.C. App. 522, 241 S.E.2d 732 (1978); State v. Long, 37 N.C. App. 662, 246 S.E.2d 846 (1978).

§ 15A-244. Contents of the application for a search warrant.

Editor's Note. — For comment on testing the credibility of search warrant affidavits, see 54 N.C.L. Rev. 477 (1976).

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

"Probable Cause". — In accord with 4th paragraph in original. See State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977); State v. Bell, 36 N.C. App. 629, 244 S.E.2d 714 (1978).

Probable cause does not mean actual and positive cause, nor does it import absolute certainty. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250 (1979).

Within the meaning of §§ 15A-243 through 15A-245, probable cause may be defined as a reasonable ground to believe that the proposed search will reveal the presence, upon the premises to be searched, of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250 (1979).

The determination of the existence of probable cause is not concerned with the question of whether the offense charged has been committed in fact, or whether the accused is guilty or innocent, but only with whether the affiant has reasonable grounds for his belief. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250 (1979).

Probable cause does not deal in certainties but deals rather in probabilities which are factual and practical considerations of everyday life upon which reasonable and prudent men may act. State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

If the apparent facts set out in an affidavit for a search warrant are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a search warrant. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250 (1979).

Warrant May Be Based on Information Not Competent as Evidence. — A valid search warrant may be issued on the basis of an affidavit setting forth information which may not be competent as evidence in a criminal trial. State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

Police Officer May Rely, etc. — In accord with 1st paragraph in original. See State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

Requirements Where Affidavit Based on Hearsay. — The affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant; but the affidavit in such case must contain some of the underlying circumstances from which the affiant's informer concluded that the articles sought were where the informer claimed they were, and some of the underlying circumstances from which the affiant concluded that the informer was credible and his information reliable. State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

Absence of Magistrate's Signature. — Warrant held valid despite the absence of the magistrate's signature. See State v. Flynn, 33 N.C. App. 492, 235 S.E.2d 424, cert. denied, 293 N.C. 255, 237 S.E.2d 537 (1977).

Applied in State v. Stinson, 39 N.C. App. 313, 249 S.E.2d 891 (1979).

Cited in State v. Long, 37 N.C. App. 662, 246 S.E.2d 846 (1978).

§ 15A-245. Basis for issuance of a search warrant; duty of the issuing official.

When Probable Cause Exists. —

In accord with 2nd paragraph in original. See State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250 (1979).

In accord with 3rd paragraph in original. See State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250 (1979).

In accord with 5th paragraph in original. See State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

In accord with 6th paragraph in original. See State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250 (1979).

In accord with 7th paragraph in original. See State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

Within the meaning of §§ 15A-243 through this section, probable cause may be defined as a reasonable ground to believe that the proposed search will reveal the presence, upon the premises to be searched, of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250 (1979).

The test to determine the sufficiency of affidavits, etc. —

In an application for a search warrant, the affidavit is deemed sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender. State v. Hamlin, 36 N.C. App. 605, 244 S.E.2d 481 (1978).

Finding May Be Based, etc. —

In accord with 2nd paragraph in original. See State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

An affidavit may be based on hearsay, etc. —

In accord with 3rd paragraph in original. See State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

Typographical Error in Year Date. — Albeit subsection (a) of this section places restrictions upon what information can be used by the magistrate in finding probable cause, the trial judge did not go beyond the permissible scope of inquiry when he heard evidence on the issue of a typographical error in the year date. State v. Beddard, 35 N.C. App. 212, 241 S.E.2d 83 (1978).

Where the year had recently changed, a typographical error in the year date was not fatal to the sufficiency of the affidavit. State v. Beddard, 35 N.C. App. 212, 241 S.E.2d 83 (1978).

§ 15A-249. Officer to give notice of identity and purpose.

Purpose, etc. —

One of the purposes of this section is to protect the public from unreasonable searches and seizures and to guard the right to privacy in homes. State v. Brown, 35 N.C. App. 634, 242 S.E.2d 184 (1978).

Notice Held Sufficient. —

See State v. Fruitt, 35 N.C. App. 177, 241 S.E.2d 125 (1978).

Cited in State v. Sutton, 34 N.C. App. 371, 238 S.E.2d 305 (1977).

§ 15A-251. Entry by force.

Court of Appeals Decision Overruled. — State v. Watson, 19 N.C. App. 160, 198 S.E.2d 185 (1973) was overruled by this section. State v. Brown, 35 N.C. App. 634, 242 S.E.2d 184 (1978).

Cited in State v. Sutton, 34 N.C. App. 371, 238 S.E.2d 305 (1977).

§ 15A-252. Service of a search warrant.

Cited in State v. Fruitt, 35 N.C. App. 177, 241 S.E.2d 125 (1978).

§ 15A-253. Scope of the search; seizure of items not named in the warrant.

Editor's Note. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

Provisions of Chapter 15A, particularly § 15A-242 and this section are codifications of federal constitutional requirements. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Plain view alone is not enough to justify warrantless seizure of evidence. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Items in Plain View Must Be Evidence of Criminal Activity. — Where a lawful search pursuant to a search warrant is being conducted, items uncovered during the course of this search may be seized if the items would have been seizable under previously announced rationales for warrantless, plain view seizures (i.e., the items were the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime, or were items for which probable cause existed to believe that they were evidence of criminal activity and would aid in a particular apprehension or conviction), and the items are discovered "inadvertently." State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Section Restricts "Plain View" Exception to Fourth Amendment. — Constitutionally permissible seizures under the "plain view" exception to the Fourth Amendment protection against warrantless searches and seizures have been restricted under this section to those instances where the officer has legal justification to be at the place where he inadvertently sees a piece of evidence in plain view. The doctrine serves to supplement the prior justification. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Under this section, the statutory "plain view" doctrine is limited to the inadvertent discovery of items pursuant to a legal search under a valid warrant though these items are not specified in the search warrant. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

This section requires inadvertence of discovery of items not specified in a search warrant. State v. Absher, 34 N.C. App. 197, 237 S.E.2d 749 (1977).

The meaning of the inadvertence requirement is that there must be no intent on the part of investigators to search for and seize the contested items not named in the warrant. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Mere suspicion of a thing's existence is clearly not destructive of inadvertence. Knowledge, presumable such as would generate probable cause, is required and a positive intent to search. State v. Absher, 34 N.C. App. 197, 237 S.E.2d 749 (1977).

Seizure of Weapons. — In order to justify the seizure of a weapon as being incident to a lawful arrest it is not necessary that the weapon be on the person being arrested. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Exercise of Judgment by Investigators. — Investigators conducting a search will exercise some judgment and "discretion" in separating the innocuous from the incriminating. State v. Louchheim, 36 N.C. App. 271, 244 S.E.2d 195, appeal dismissed, 295 N.C. 263, 245 S.E.2d 779 (1978).

§ 15A-254. List of items seized.

Cited in State v. Fruitt, 35 N.C. App. 177, 241 S.E.2d 125 (1978).

§ 15A-256. Detention and search of persons present in private premises or vehicle to be searched.

Cited in State v. Long, 37 N.C. App. 662, 246 S.E.2d 846 (1978).

ARTICLE 14.

Nontestimonial Identification.

§ 15A-271. Authority to issue order.

Applicability of Article. —
In accord with 1st paragraph in original. See State v. Thompson, 37 N.C. App. 651, 247 S.E.2d 235 (1978).

Effect of Article. —
The thrust of this article is to provide the State with a valuable new investigative tool to compel the presence of unwilling suspects for nontestimonial identification procedures, even though insufficient probable cause exists to permit their arrest. State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978).

When Use of Article Unnecessary. — It was unnecessary for the police to utilize the procedures in this article allowing involuntary detention for nontestimonial identification where the defendant voluntarily participated in the pretrial confrontation. State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978).

§ 15A-272. Time of application; additional investigative procedures not precluded.

Applied in State v. McCain, 39 N.C. App. 213, 249 S.E.2d 812 (1978).

§ 15A-278. Contents of order.

Defendant Arrested on Misdemeanor Charge. — The provisions of subdivision (5) of this section were not applicable where the defendant was legally arrested on a misdemeanor charge, and therefore, could be photographed without the aid of the nontestimonial order. State v. Carson, 296 N.C. 31, 249 S.E.2d 417 (1978).

§ 15A-279. Implementation of order.

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

SUBCHAPTER III. CRIMINAL PROCESS.

ARTICLE 17.

Criminal Process.

§ 15A-301. Criminal process generally.

(d) Return. —

(1) The officer who serves or executes criminal process must enter the date of the service or execution on the process and return it to the clerk of court in the county in which issued.

(2) If criminal process is not served or executed within a number of days indicated below, it must be returned to the clerk of court in the county in which it was issued, with a reason for the failure of service or execution noted thereon.

a. Warrant for arrest — 180 days.

b. Order for arrest — 180 days.

c. Criminal summons — 90 days or the date the defendant is directed to appear, whichever is earlier.

(3) Failure to return the process to the clerk does not invalidate the process, nor does it invalidate service or execution made after the period specified in subdivision (2).

(4) The clerk to which return is made may redeliver the process to a law-enforcement officer for further attempts at service. If the process is a criminal summons, he may reissue it only upon endorsement of a new designated time and date of appearance.

(e) Copies to Be Made by Clerk. —

(1) The clerk may make a certified copy of any criminal process filed in his office pursuant to subsection (a) when the original process has been lost or when the process has been returned pursuant to subdivision (d)(2). The copy may be executed as effectively as the original process whether or not the original has been redelivered as provided in G.S. 15A-301(d)(4).

(2) When criminal process is returned to the clerk pursuant to subdivision (d)(1) and it appears that the appropriate venue is in another county, the clerk must make and retain a certified copy of the process and transmit the original process to the clerk in the appropriate county.

(3) Upon request of a defendant, the clerk must make and furnish to him without charge one copy of every criminal process filed against him.

(4) Nothing in this section prevents the making and retention of uncertified copies of process for information purposes under G.S. 15A-401(a)(2) or for any other lawful purpose.

(1979, c. 725, ss. 1-3.)

Editor's Note. —

The 1979 amendment substituted "180 days" for "90 days" in paragraphs a and b of subdivision (d)(2), added "whether or not the original has been redelivered as provided in G.S. 15A-301(d)(4)" to the second sentence of subdivision (e)(1) and added subdivision (e)(4).

As the rest of the section was not changed by the amendment, only subsections (d) and (e) are set out.

Applied in State v. Soloman, 40 N.C. App. 600, 253 S.E.2d 270 (1979).

§ 15A-304. Warrant for arrest.

Cited in State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978).

§ 15A-305. Order for arrest.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

SUBCHAPTER IV. ARREST.

ARTICLE 20.

Arrest.

§ 15A-401. Arrest by law-enforcement officer. — (a) Arrest by Officer Pursuant to a Warrant. —

(1) Warrant in Possession of Officer. — An officer having a warrant for arrest in his possession may arrest the person named or described therein at any time and at any place within the officer's territorial jurisdiction.

(2) Warrant Not in Possession of Officer. — An officer who has knowledge that a warrant for arrest has been issued and has not been executed, but who does not have the warrant in his possession, may arrest the person named therein at any time. The officer must inform the person arrested that the warrant has been issued and serve the warrant upon him as soon as possible. This subdivision applies even though the arrest process has been returned to the clerk under G.S. 15A-301.

(b) Arrest by Officer Without a Warrant. —

(1) Offense in Presence of Officer. — An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence.

(2) Offense Out of Presence of Officer. — An officer may arrest without a warrant any person who the officer has probable cause to believe:

a. Has committed a felony; or

b. Has committed a misdemeanor, and:

1. Will not be apprehended unless immediately arrested, or

2. May cause physical injury to himself or others, or damage to property unless immediately arrested.

(3) Subdivisions (1) and (2) shall apply to arrest for assault, for communicating a threat, or for domestic criminal trespass, already committed or being committed by a person who is the spouse or former spouse of the alleged victim or by a person with whom the alleged victim is living or has lived as if married.

(1979, c. 561, s. 3; c. 725, s. 4.)

Editor's Note. —

The first 1979 amendment, effective October 1, 1979, added subdivision (3) to subsection (b).

The second 1979 amendment added the last sentence of subdivision (a)(2).

As the rest of the section was not changed by the amendment, only subsections (a) and (b) are set out.

Session Laws 1979, c. 561, s. 8, provides: "This act shall become effective October 1, 1979, and shall apply to all occurrences involving the acts enumerated above occurring on or after that date."

I. GENERAL CONSIDERATION.

Mere failure to comply with the letter of this section in making an arrest does not require that evidence discovered as a result of the arrest be excluded. State v. Sutton, 34 N.C. App. 371, 238 S.E.2d 305 (1977).

Identification Evidence Subsequently Obtained Not Excluded. — Nothing in the law of this State requires that identification evidence, obtained subsequent to an illegal arrest, be excluded. State v. Finch, 293 N.C. 132, 235 S.E.2d 819 (1977).

Finding That Defendant Was Taken, etc. — Just as a formal declaration of arrest is not essential to the making of an arrest, an officer's statement that a defendant was or was not under arrest is not conclusive. When a law enforcement officer, by word or actions, indicates that an individual must remain in the officer's presence or come to the police station against his will, the person is for all practical purposes under arrest if there is a substantial imposition of the officer's will over the person's liberty. State v. Sanders, 295 N.C. 361, 245 S.E.2d 674 (1978).

A person has the right, etc. —

In accord with original. See State v. Raynor, 33 N.C. App. 698, 236 S.E.2d 307 (1977).

Civil Liability of Arresting Officer. — For case discussing the civil liability for false imprisonment of an arresting officer, acting under a valid arrest warrant, who arrests the wrong person because of a mistake in the identity of the person arrested, see Robinson v. City of Winston-Salem, 34 N.C. App. 401, 238 S.E.2d 628 (1977).

Applied in State v. Cunningham, 34 N.C. App. 72, 237 S.E.2d 334 (1977); State v. Thompson, 37 N.C. App. 628, 246 S.E.2d 827 (1978).

Stated in State v. Odom, 35 N.C. App. 374, 241 S.E.2d 372 (1978).

Cited in State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979).

II. ARREST WITHOUT WARRANT.

A. In General.

Whether an arrest warrant must be obtained is determined by State law. State v. Wooten, 34 N.C. App. 85, 237 S.E.2d 301 (1977).

In this State the power of arrest without warrant, etc. —

Prior to this section North Carolina law limited arrest without a warrant for crimes not committed in the presence of the officer to felonies, when there was reasonable ground

to believe that the person will evade arrest if not immediately taken into custody. This section broadens the authority to arrest for crimes committed out of an officer's presence to include felonies generally and misdemeanors when the officer has probable cause to believe the person (1) has committed a misdemeanor and (2) will not be apprehended unless immediately arrested, or may cause physical injury to himself or others, or damage to property unless immediately arrested. In re Pinyatello, 36 N.C. App. 542, 245 S.E.2d 185 (1978).

Subsection (b) of this section broadened the authority of a law-enforcement officer to make a warrantless arrest for crimes not commited in his presence. In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

An arrest without warrant except as authorized, etc. —

In accord with 1st paragraph in original. See State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977).

"Probable Cause." —

In accord with 3rd paragraph in original. See State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979).

A warrantless arrest is based on probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon. The standard is the same as that required by the United States Constitution. State v. Mathis, 295 N.C. 623, 247 S.E.2d 919 (1978).

When incriminating evidence comes to the officer's attention during detention, such evidence may establish a reasonable basis for finding the probable cause necessary for effecting a warrantless arrest. State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979).

Whether probable cause exists depends upon whether at that moment the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a prudent man in believing that the suspect has committed or is committing an offense. State v. Matthews, 40 N.C. App. 41, 251 S.E.2d 897 (1979).

The existence of probable cause, etc. —

In accord with 2nd paragraph in original. See State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977); In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

To establish probable cause, etc. —

In accord with original. See State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977).

Probable cause and reasonable ground to believe, etc. —

In accord with 1st paragraph in original. See State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977); In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979); State v. Matthews, 40 N.C. App. 41, 251 S.E.2d 897 (1979).

Information given by one officer to another officer is reasonably reliable information to provide probable cause. State v. Matthews, 40 N.C. App. 41, 251 S.E.2d 897 (1979).

Probable cause may be based upon information given to the officer by another, the source of such information being reasonably reliable. In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

Evidence That Person May Injure Self or Others. — The same evidence that provides probable cause for a belief that a misdemeanor had been committed is sufficient to provide probable cause to believe that defendant might injure himself or others if allowed to leave the police station at that time. State v. Matthews, 40 N.C. App. 41, 251 S.E.2d 897 (1979).

Authority to Make Brief Detention of Citizens. — It is permissible for police officers to make, in the course of a routine investigation, a brief detention of citizens upon a reasonable suspicion that criminal activity has taken place. State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979).

Factual Findings on Issue of Probable Cause. — In determining whether probable cause exists in any particular case, it is the function of the trial court, if there be conflicting evidence, to find the relevant facts. Such factual findings, if supported by competent evidence, are binding on appeal. However, whether the facts so found by the trial court or shown by uncontradicted evidence are such as to establish probable cause in a particular case, is a question of law as to which the trial court's ruling may be reviewed on appeal. In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

B. Illustrative Cases.

1. Offense in Presence of Officer.

Driving Motor Vehicle While under Influence of Intoxicants. —

The petitioner's driving privilege was properly revoked because of his unwillingness to take the breathalyzer test, whether or not his warrantless arrest was legal under this section, where the arrest was constitutionally valid by virtue of the fact that the arresting officer had ample information to provide him with probable cause to arrest the petitioner for operating a motor vehicle upon a public highway while under the influence of intoxicants. In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

Threats and Profane Language in Presence of Officer. — The evidence was sufficient to sustain the legality of defendant's arrest without a warrant for disorderly conduct, where, although the arresting officer did not quote the defendant's precise language to the jury, he did testify that the defendant was cursing and threatening a cab driver and that the threats and profane language were continued in the presence of the officer. State v. Raynor, 33 N.C. App. 698, 236 S.E.2d 307 (1977).

Reasonable Grounds to Believe Defendant Was in Possession of Heroin. — Once the arresting agent corroborated the description of the defendant provided by an informant by observing the defendant at the named location, the agent had reasonable grounds to believe the defendant was in possession of heroin, a felony, thereby committing an offense in the agent's presence, and creating probable cause to arrest. State v. Wooten, 34 N.C. App. 85, 237 S.E.2d 301 (1977).

2. Offense Out of Presence of Officer.

Information Sufficient to Authorize Arrest for Robbery. —

Where the police officer first saw defendant on a bank near a wooded area, defendant matched the general description the officer had received of a robbery suspect, defendant's appearance gave rise to a reasonable inference that he had been through a wooded area, and the officer was aware that suspects in the robbery had escaped into woods less than one mile from the spot the officer was patrolling, the officer had probable cause to believe that a felony had been committed and that defendant had committed it. Defendant's arrest was therefore legal under subsection (b)(2) of this section. State v. Mathis, 295 N.C. 623, 247 S.E.2d 919 (1978).

III. USE OF FORCE IN ARREST.

Use of Force in Case of Assault on Law Officer. — In all cases where the charge is assault on a law officer in violation of § 14-33(b)(4), or assault of a law officer with a firearm (§ 14-34.2), the use of excessive force by the law officer in making an arrest or preventing escape from custody does not take the officer outside the performance of his duties, nor does it make the arrest unlawful. State v. Mensch, 34 N.C. App. 572, 239 S.E.2d 297 (1977).

In a prosecution for assault on a police officer it is not incumbent upon the State to prove that the law officer did not use excessive force in making an arrest, but where there is evidence tending to show the use of such excessive force by the law officer, the trial court should instruct the jury that the assault by the defendant upon the law officer was justified or excused if the assault was limited to the use of reasonable force by the defendant in defending himself from that excessive force. State v. Mensch, 34 N.C. App. 572, 239 S.E.2d 297 (1977).

Discretion to Determine Reasonableness of Force. — Within reasonable limits, the officer is properly left with the discretion to determine the amount of force required under the circumstances as they appeared to him at the time of the arrest. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

An officer of the law has the right to use such force as he may reasonably believe necessary in the proper discharge of his duties to effect an arrest. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 40 (1979).

One resisting an illegal arrest is not resisting an officer within the discharge of his official duties. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

The right to defend oneself from the excessive use of force by a police officer must be carefully distinguished from the well-guarded right to resist an arrest which is unlawful. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

The right to use force to defend oneself against the excessive use of force during an arrest may arise despite the lawfulness of the arrest, and the use of excessive force does not render the arrest illegal. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

Bystander Aiding Arrestee. — The bystander coming to the aid of an arrestee is entitled to use only such force as is reasonable necessary to defend the arrestee from the excessive use of force. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

The privilege to intervene in the context of a supposed felonious assault upon an arrestee by a person known or reasonably believed to be a police officer must be more limited than the traditionally recognized right to come to the defense of a third party. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

One who comes to the aid of an arrestee must do so at his own peril and should be excused only when the individual would himself be justified in defending himself from the conduct of the arresting officers. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

Instruction on Use of Force to Resist Excessive Force. — When there is evidence tending to show the excessive use of force by a law enforcement officer in making an arrest, the trial court is required to instruct the jury that the force used against the law enforcement officer was justified or excused if the assault was limited to the use of reasonable force by defendant in defending himself from excessive force. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

§ 15A-402. Territorial jurisdiction of officers to make arrests.

Stated in State v. Matthews, 40 N.C. App. 41, 251 S.E.2d 897 (1979).

§ 15A-405. Assistance to law-enforcement officers by private persons to effect arrest or prevent escape; benefits for private persons.

(b) Benefits to Private Persons. — A private person assisting a law-enforcement officer pursuant to subsection (a) is:

(1) To be treated as a citizen duly deputized as a deputy by a sheriff or other law-enforcement officer in an emergency for the purposes of G.S. 143-166(m) (Law-Enforcement Officers' Benefit and Retirement Fund);

(2) Entitled to the same benefits as a "law-enforcement officer" as that term is defined in G.S. 143-166.2(d) (Law-Enforcement Officers', Firemen's and Rescue Squad Workers' Death Benefit Act); and

(3) To be treated as an employee of the employer of the law-enforcement officer within the meaning of G.S. 97-2(2) (Workers' Compensation Act).

The Governor and the Council of State are authorized to allocate funds from the Contingency and Emergency Fund for the payment of benefits under subdivisions (1) and (3) when no other source is available for the payment of such benefits and when they determine that such allocation is necessary and appropriate. (1868-9, c. 178, subch. 1, s. 2; Code, s. 1125; Rev., s. 3181; C. S., s. 4547; 1973, c. 1286, s. 1; 1979, c. 714, s. 2.)

Editor's Note. — The 1979 amendment, effective July 1, 1979, substituted "Workers' " for "Workmen's" in subdivision (3) of subsection (b).

SUBCHAPTER V. CUSTODY.

ARTICLE 23.

Police Processing and Duties upon Arrest.

§ 15A-501. Police processing and duties upon arrest generally.

Editor's Note. —

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

"Unnecessary Delay" under Subdivision (2). — Subdivision (2) of this section and § 15A-511(a)(1) only require that an arrested person be taken before a magistrate "without unnecessary delay," and a delay of only one hour after the defendant had been taken into custody and advised of his rights could not be considered undue delay. State v. Wheeler, 34 N.C. 243, 237 S.E.2d 874 (1977).

Delay Held Necessary and Reasonable. — The delay between the arrest of the defendant and his appearance before a magistrate was necessary and reasonable where the interim period was spent by the arresting officers in recovering the stolen goods and attempting to locate a person arrested with the defendant who had escaped. State v. Sings, 35 N.C. App. 1, 240 S.E.2d 471 (1978).

Violation of Subdivision (2). — Police officers violated subdivision (2) by failing to take defendant before a magistrate without unnecessary delay. State v. Sanders, 33 N.C. App. 284, 235 S.E.2d 94, cert. denied, 293 N.C. 257, 235 S.E.2d 539 (1977).

Meaning of Words "Reasonably Necessary" in Subdivision (4). — Based on the official commentary provided by the legislature, the words "reasonably necessary" in subdivision (4) have a stricter meaning than would ordinarily apply. Only exigent circumstances, such as were present in Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), where the only eyewitness was critically injured, will suffice as "reasonably necessary." State v. Sanders, 33 N.C. App. 284, 235 S.E.2d 94, cert. denied, 293 N.C. 257, 235 S.E.2d 539 (1977).

Violation of Subdivision (4). — Police officers violated subdivision (4) by taking defendant to the town in which the crime was committed for a show-up after they had first prepared to take him before a magistrate in the town in which he was arrested. State v. Sanders, 33 N.C. App. 284, 235 S.E.2d 94, cert. denied, 293 N.C. 257, 235 S.E.2d 539 (1977).

Effect of Denial of Communication Rights. — Where the defendant was informed of his Miranda rights, waived those rights, and voluntarily submitted his statement admitting guilt to police, the defendant could not have suffered prejudice had he been denied his statutory right to communicate with friends. State v. Curmon, 295 N.C. 453, 245 S.E.2d 503 (1978).

Right to Secure Attendance of Witness at Breathalyzer Test. — Subsection (5) of this section and 20-16.2(a)(4) give an accused a reasonable time to call an attorney and communicate with him but § 20-16.2(a)(4) gives an accused only 30 minutes to select a witness and secure his attendance at the breathalyzer test. Price v. North Carolina Dep't of Motor Vehicles, 36 N.C. App. 698, 245 S.E.2d 518, appeal dismissed, 295 N.C. 551, 248 S.E.2d 728 (1978).

Applied in State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

Cited in State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978); State v. Jolly, 297 N.C. 121, 254 S.E.2d (1979).

§ 15A-502. Photographs and fingerprints.

(c) This section does not authorize the taking of photographs or fingerprints of a juvenile except under G.S. 7A-596 through 7A-627.
(1979, c. 850.)

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

The 1979 amendment substituted, in subsection (c), "juvenile except under G.S. 7A-596 through 7A-627" for "'child' as defined for the purposes of G.S. 7A-278(2), unless the case has been transferred to the superior court division pursuant to G.S. 7A-280."

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

Legislative Intent. — It was the intent of the legislature that photographs taken under the authority of this section could be used for any law enforcement purpose. State v. Carson, 296 N.C. 31, 249 S.E.2d 417 (1978).

The Official Commentary correctly states the legislature's intent that this section carries forward the concept of the present provisions of the former first two paragraphs of § 114-19. Those provisions have been simplified and broadened in some respects, but restricted as to motor vehicle and juvenile offenses. State v. Wilson, 296 N.C. 298, 250 S.E.2d 621 (1979).

Use of Photograph in Subsequent Identification Procedure. — Where a defendant was legally arrested for a misdemeanor and photographed under the authority of this section, the photograph could be used in a photographic identification procedure in connection with defendant's first-degree rape case. State v. Carson, 296 N.C. 31, 249 S.E.2d 417 (1978).

A photograph taken prior to the defendant's arrest for rape was not illegally taken in contravention of the provisions of this section. State v. Wilson, 296 N.C. 298, 250 S.E.2d 621 (1979).

This section does not create an exclusionary rule of evidence. State v. Wilson, 296 N.C. 298, 250 S.E.2d 621 (1979).

ARTICLE 24.

Initial Appearance.

§ 15A-511. Initial appearance.

Editor's Note. —
For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

Requirement that Person Be Taken Before Magistrate "Without Unnecessary Delay". — Subdivision (a)(1) of this section and § 15A-501(2) only require that an arrested person be taken before a magistrate "without unnecessary delay" and a delay of only one hour after the defendant had been taken into custody and advised of his rights could not be considered undue delay. State v. Wheeler, 34 N.C. 243, 237 S.E.2d 874 (1977).

Delay Held Necessary and Reasonable. — The delay between the arrest of the defendant and his appearance before a magistrate was necessary and reasonable where the interim period was spent by the arresting officers in recovering the stolen goods and attempting to locate a person arrested with the defendant who had escaped. State v. Sings, 35 N.C. App. 1, 240 S.E.2d 471 (1978).

Effect of Failure to Issue Magistrate's Order. — Compliance with subdivision (c)(3) of this section is not mandatory, and a failure to comply will not affect the validity of a trial. State

v. Matthews, 40 N.C. App. 41, 251 S.E.2d 897 (1979).

Cited in State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978); State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

ARTICLE 26.

Bail.

§ 15A-534. Procedure for determining conditions of pretrial release.

(c) In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, character, and mental condition; whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; the length of his residence in the community; his record of convictions; his history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.

(1977, 2nd Sess., c. 1134, s. 5.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective Oct. 1, 1978, inserted "whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision" near the middle of subsection (c).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

Consideration of Defendant's Mental and Physical Condition. — In determining the conditions of release or the propriety of revoking a defendant's bond, the trial court may consider not only the question of whether the defendant will appear for trial but may also consider whether he will appear for trial in such mental and physical condition as to be able to proceed. State v. Brooks, 38 N.C. App. 445, 248 S.E.2d 369 (1978).

Where the defendant had specifically indicated to the court in his motion for a continuance that his illness and the medication it necessitated directly impaired his mental capacity, and the defendant's evidence additionally indicated that, absent hospitalization and definitive treatment, the condition might well continue to impair his mental ability beyond the next criminal term of court, the trial court's order granting the defendant's motion for a continuance and revoking his appearance bond in order to insure that he would be both present and able to proceed with trial was without error. State v. Brooks, 38 N.C. App. 445, 248 S.E.2d 369 (1978).

The primary purpose of an appearance bond is to insure the defendant's presence at trial. State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

The amount of bail pending trial is a matter within the trial judge's discretion. State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

A claim that excessive bail prejudiced the efforts of the accused to prepare for trial will not be sustained on mere unsupported and conclusory allegations. State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

§ 15A-534.1. Crimes of domestic violence; bail and pretrial release. — In all cases in which the defendant is charged with assault on or communicating a threat to a spouse or former spouse or a person with whom the defendant lives or has lived as if married, with domestic criminal trespass, or with violation of an order entered pursuant to Chapter 50A, Domestic Violence, of the General Statutes, the following provisions shall apply in addition to the provisions of G.S. 15A-534:

(1) Upon a determination by the judicial official that the immediate release of the defendant will pose a danger of injury to the alleged victim or to any other person or is likely to result in intimidation of the alleged

victim and upon a determination that the execution of an appearance bond as required by G.S. 15A-534 will not reasonably assure that such injury or intimidation will not occur, a judicial official may retain the defendant in custody for a reasonable period of time while determining the conditions of pretrial release.

(2) A judicial official may impose the following conditions on pretrial release:

a. That the defendant stay away from the home, school, business or place of employment of the alleged victim;

b. That the defendant refrain from assaulting, beating, molesting, or wounding the alleged victim;

c. That the defendant refrain from removing, damaging or injuring specifically identified property;

d. That the defendant may visit his or her child or children at times and places provided by the terms of any existing order entered by a judge.

The conditions set forth above may be imposed in addition to requiring that the defendant execute a secured appearance bond.

(3) Should the defendant be an inebriate, mentally ill or imminently dangerous to himself or others the provisions of Article 5A of Chapter 122 "Involuntary Commitment" shall apply. (1979, c. 561, s. 4.)

Editor's Note. — Session Laws 1979, c. 561, s. 8, provides: "This act shall become effective October 1, 1979, and shall apply to all occurrences involving the acts enumerated above occurring on or after that date."

§ 15A-537. Persons authorized to effect release.

Editor's Note. —

Sessions Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15A-538. Modification of order on motion of person detained; substitution of surety.

Cited in State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979).

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

ARTICLE 29.

First Appearance before District Court Judge.

§ 15A-601. First appearance before a district court judge; right in felony and other cases in original jurisdiction of superior court; consolidation of first appearance before magistrate and before district court judge; first appearance before clerk of superior court.

(e) The clerk of the superior court in the county in which the defendant is taken into custody may conduct a first appearance as provided in this Article if

a district court judge is not available in the county within 96 hours after the defendant is taken into custody. The clerk, in conducting a first appearance, shall proceed under this Article as would a district court judge. (1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, ss. 139, 140; 1979, c. 651.)

Editor's Note. —

The 1979 amendment, effective October 1, 1979, added subsection (e).

As the rest of the section was not changed by the amendment, only subsection (e) is set out.

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

Cited in State v. Sanders, 294 N.C. 337, 240 S.E.2d 788 (1978).

§ 15A-605. Additional proceedings at first appearance before judge.

Stated in State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978).

§ 15A-606. Demand or waiver of probable-cause hearing.

Editor's Note. —

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

No Right to Hearing, etc. —

Subsection (a) of this section requires a probable-cause hearing only in those situations in which no indictment has been returned by a grand jury. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978); State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978).

A probable-cause hearing is unnecessary after the grand jury finds an indictment. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978).

ARTICLE 30.

Probable-Cause Hearing.

§ 15A-611. Probable-cause hearing procedure.

The purpose of a preliminary hearing, etc. —

A probable-cause hearing may afford the opportunity for a defendant to discover the strengths and weaknesses of the State's case. However, discovery is not the purpose for such a hearing. The function of a probable-cause hearing is to determine whether there is probable cause to believe that a crime has been committed and that the defendant committed it. The establishment of probable cause ensures that a defendant will not be unjustifiably put to the trouble and expense of trial. State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978).

There is no constitutional requirement for a preliminary hearing. State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978).

Hearing Not Required, etc. —

A probable-cause hearing is unnecessary after the grand jury finds an indictment. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978); State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978).

There is no necessity for a preliminary hearing after a grand jury returns a bill of indictment. State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978).

Cited in State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978).

§ 15A-613. Setting offense for trial in district court.

Applied in State v. Joyner, 33 N.C. App. 361, 235 S.E.2d 107 (1977).

ARTICLE 31.

The Grand Jury and Its Proceedings.

§ 15A-621. "Grand jury" defined.

Quoted in State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978); State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

§ 15A-622. Formation and organization of grand juries; other preliminary matters.

(b) To impanel a new grand jury, the presiding judge must direct that the names of all persons returned as jurors be separately placed in a container. The clerk must draw out the names of 18 persons to serve as grand jurors. Of these 18, the first nine drawn serve until the first session of court at which criminal cases are heard held in the county after the following January 1, and thereafter until their replacements are selected and sworn. The next nine serve until the first session of court at which criminal cases are heard held in the county after the following July 1, and thereafter until their replacements are selected and sworn. If this formula results in any term likely to be shorter than two months or longer than 15 months, the presiding judge impaneling the grand jury may modify the terms. Thereafter, beginning with the first session of superior court at which criminal cases are heard held in the county following January 1 and July 1 of each year, nine new grand jurors must be selected in the manner provided above to replace the jurors whose terms have expired. All new grand jurors so selected serve until the first session of court at which criminal cases are heard held after January 1 or July 1 which most nearly results in a 12-month term, and thereafter until their replacements are selected and sworn. If a vacancy occurs in the membership of the grand jury, the superior court judge next convening the jury or next holding a session of court at which criminal cases are heard in the county may order that a new juror be drawn in the manner provided above to fill the vacancy.

The senior resident superior court judge of the district may impanel a second grand jury in any county of the district to serve concurrently with the first. The second grand jury shall be impaneled as provided in the first paragraph of this subsection. The court shall continue to have two grand juries until the senior resident superior court judge orders the second grand jury to terminate.

(1979, c. 177, s. 1.)

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

The 1979 amendment added the second paragraph of subsection (b).

Stated in State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978).

§ 15A-623. Grand jury proceedings and operations in general.

Quoted in State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978); State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

§ 15A-628. Functions of grand jury; record to be kept by clerk.

Cited in State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978).

ARTICLE 32.

Indictment and Related Instruments.

§ 15A-641. Indictment and related instruments; definitions of indictment, information, and presentment.

A presentment does not institute a criminal proceeding, but is only a device whereby the grand jury brings to the attention of the district attorney subject matter which requires investigation by the district attorney and the submission of a properly drawn indictment by him to the grand jury when the facts so warrant. State v. Cole, 294 N.C. 304, 240 S.E.2d 355 (1978).

Subsection (c) Codifies Previous Holding of Court. — Subsection (c) of this section codifies and clarifies the holding in State v. Thomas, 236 N.C. 454, 73 S.E.2d 283 (1952). State v. Cole, 294 N.C. 304, 240 S.E.2d 355 (1978).

§ 15A-644. Form and content of indictment, information or presentment.

Detail of Foreman's Entry. — Although it is better practice for the foreman's entry upon the bill of indictment, over his signature, to state expressly that 12 or more grand jurors concurred in such finding, since even a directory provision of a statute should be obeyed, this is not necessary to the validity of the bill of indictment where the foreman's statement upon the bill is clearly so intended and there is nothing to indicate the contrary. State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978).

Applied in State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

§ 15A-646. Superseding indictments and informations.

Stated in State v. Berry, 35 N.C. App. 128, 240 S.E.2d 633 (1978).

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

ARTICLE 35.

Speedy Trial.

§ 15A-701. Time limits and exclusions. — (a) The trial of the defendant charged with a criminal offense shall begin within the time limits specified below:

(1) Within 90 days from the date the defendant is arrested, served with criminal process, waives an indictment or is indicted, whichever occurs last;

(2) Within 90 days from the first regularly scheduled criminal session of superior court held after the defendant has given notice of appeal in a misdemeanor case for a trial de novo in the superior court;

(3) When a charge is dismissed, other than under G.S. 15A-703, and the defendant is afterwards charged with the same offense or an offense based on the same act or transaction or on the same series of

acts or transactions connected together or constituting parts of a single scheme or plan, then within 90 days from the date that the defendant was arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last for the original charge;

(4) When the defendant is to be tried again following a declaration by the trial judge of a mistrial, then within 60 days of that declaration; or

(5) Within 60 days from the date the action occasioning the new trial becomes final when the defendant is to be tried again following an appeal or collateral attack.

(a1) Notwithstanding the provisions of G.S. 15A-701(a) the trial of a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, 1980, shall begin within the time limits specified below:

(1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last;

(2) Within 120 days from the first regularly scheduled criminal session of superior court held after the defendant has given notice of appeal in a misdemeanor case for a trial de novo in the superior court;

(3) When a charge is dismissed, other than under G.S. 15A-703, or a finding of no probable cause pursuant to G.S. 15A-612, and the defendant is afterwards charged with the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, then within 120 days from the date that the defendant was arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last, for the original charge;

(4) When the defendant is to be tried again following a declaration by the trial judge of a mistrial, then within 120 days of that declaration; or

(5) Within 120 days from the date the action occasioning the new trial becomes final when the defendant is to be tried again following an appeal or collateral attack.

(b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:

(1) Any period of delay resulting from other proceedings concerning the defendant including, but not limited to, delays resulting from

a. A mental or physical examination of the defendant, or a hearing on his mental or physical incapacity;

b. Trials with respect to other charges against the defendant;

c. Interlocutory appeals; or

d. Hearings on pretrial motions or the granting or denial of such motions;

(2) Any period of delay during which the prosecution is deferred by the prosecutor pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct;

(3) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness for the defendant or the State. For the purpose of this subdivision, a defendant or an essential witness shall be considered

a. Absent when his whereabouts are unknown and he is attempting to avoid apprehension or prosecution or when his whereabouts cannot be determined by due diligence; and

b. Unavailable when his whereabouts are known but his presence for testifying at the trial cannot be obtained by due diligence or he resists appearing at or being returned for trial;

(4) Any period of delay resulting from the fact that the defendant is mentally incapacitated or physically unable to stand trial;

(5) When a charge is dismissed by the prosecutor under the authority of G.S. 15A-931 and afterwards a new indictment or information is filed against the same defendant or the same defendant is arrested or served with criminal process for the same offense, or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, any period of delay from the date the initial charge was dismissed to the date the time limits for trial under this section would have commenced to run as to the subsequent charge;

(6) A period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for serverance has been granted;

(7) Any period of delay resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding.

The factors, among others, which a judge shall consider in determining whether to grant a continuance are as follows:

a. Whether the failure to grant a continuance would be likely to result in a miscarriage of justice; and

b. Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the time limits established by this section;

c. Repealed by Session Laws 1977, 2nd Sess., c. 1179, s. 6;

(8) Any period of delay occasioned by the venue of the defendant's case being within a county where, due to limited number of court sessions scheduled for the county, the time limitations of this section cannot reasonably be met;

(9) A period of delay resulting from the defendant's being in the custody of a penal or other institution of a jurisdiction other than the jurisdiction in which the criminal offense is to be tried;

(10) A period of delay when the defendant or his attorney has an obligation of service to the State of North Carolina or to the United States government and the court, with the consent of both the defendant and the State, continues the case for a period of time consistent with that obligation; and

(11) A period of delay from time the prosecutor enters a dismissal with leave for the nonappearance of the defendant until the prosecutor reinstitutes the proceedings pursuant to G.S. 15A-932.

(1977, 2nd Sess., c. 1179, ss. 1-8; 1979, c. 1018, ss. 1-2A.)

Editor's Note. —

The 1977, 2nd Sess., amendment substituted "is indicted" for "is notified pursuant to G.S. 15A-630 that an indictment has been filed with the superior court against him" in subdivision (a)(1) and for "is notified pursuant to G.S. 15A-630 that an indictment has been filed against him" in the introductory language and in subdivision (1) of subsection (a1), substituted "was indicted" for "was notified pursuant to G.S. 15A-630 that an indictment has been filed with the superior court against him" near the end of subdivisions (a)(3) and (a1)(3), added "and" at the end of paragraph a of subdivision (b)(7), deleted "and" at the end of parabraph b of subdivision (b)(7), repealed paragraph c of subdivision (b)(7), relating to delay after grand jury proceedings have begun in certain cases, added "and" at the end of subdivision (b)(10) and added subdivision (b)(11).

Session Laws 1977, c. 787, s. 2, as amended by Session Laws 1977, 2nd Sess., c. 1179, s. 9, provides: "This act shall apply to any person who is arrested, served with criminal process, waives an indictment, or is indicted on or after Oct. 1, 1978."

Session Laws 1977, c. 787, s. 3, which repealed subsection (a1) of this section effective July 1, 1980, was repealed by Session Laws 1977, 2nd Sess., c. 1179, s. 10.

The 1979 amendment substituted "from the first regularly scheduled criminal session of superior court held after the defendant has given notice" for "of the giving of notice" in subdivisions (a)(2) and (a1)(2) and inserted "or a finding of no probable cause pursuant to G.S. 15A-612," near the beginning of subdivision (a1)(3).

As subsection (c) was not changed by the amendment, it is not set out.

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

Cited in Morrison v. Jones, 565 F.2d 272 (4th Cir. 1977).

ARTICLE 36.

Special Criminal Process for Attendance of Defendants.

§ 15A-711. Securing attendance of criminal defendants confined in institutions within the State; requiring prosecutor to proceed. — (a) When a criminal defendant is confined in a penal or other institution under the control of the State or any of its subdivisions and his presence is required for trial, the prosecutor may make written request to the custodian of the institution for temporary release of the defendant to the custody of an appropriate law-enforcement officer who must produce him at the trial. The period of the temporary release may not exceed 60 days. The request of the prosecutor is sufficient authorization for the release, and must be honored, except as otherwise provided in this section.

(1979, c. 107, s. 1.)

Editor's Note. —

The 1979 amendment substituted "prosecutor" for "solicitor" near the middle of the first sentence of subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Subsection (c) did not give a superior court judge the power to require a trial at a certain session or order a dismissal. The statute requires that the request for speedy trial be served on the solicitor (prosecutor), who then has six months to proceed. State v. Turner, 34 N.C. App. 78, 237 S.E.2d 318 (1977).

State Must Proceed within Six Months to Request Defendant's Release for Trial. — Subsection (c) provides that following defendant's request the State must proceed within six months "pursuant to subsection (a)," that is, not to trial but to request a defendant's temporary release for trial, which "temporary release may not exceed 60 days." State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977).

The legislature envisioned that trial following a request under subsection (c) would be held within eight months — the six-month period provided by subsection (c) plus the 60-day release period provided by subsection (a). This coincides with the eight-month period set out in § 15-10.2(a). State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977).

The fact that the defendant's trial was not held within the six-month period was not a violation of subsection (c), where the State proceeded within the six-month period by making a request for delivery of the defendant for trial. State v. Turner, 34 N.C. App. 78, 237 S.E.2d 318 (1977).

ARTICLE 37.

Uniform Criminal Extradition Act.

§ 15A-730. Rights of accused person; application for writ of habeas corpus.

Failure to Comply with Technical Procedures. — The Uniform Act contains no provision requiring dismissal of an underlying indictment where technical procedures are not complied with. State v. Love, 296 N.C. 194, 250 S.E.2d 220 (1978).

The trial court properly denied the defendant's motion to dismiss on the ground that he was detained in New York beyond the period provided for by New York law, since the courts of North Carolina are not the place for the defendant to assert alleged rights under New

York law. State v. Love, 296 N.C. 194, 250 S.E.2d 220 (1978).

ARTICLE 38.

Interstate Agreement on Detainers.

§ 15A-761. Agreement on Detainers entered into; form and contents.

Petition for Speedy Trial. — Defendant's argument that the prosecutor had knowledge of the place of his imprisonment is irrelevant to the fact that the bare motion for a speedy trial, filed without any of the accompanying information required by Article III(a), was insufficient to put the prosecutor on notice that the defendant was availing himself of the benefits of the provision and that the prosecutor would be required to put him to trial within 180 days. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978).

A petition for a speedy trial will not be considered as a request for a final disposition under Article III, unless the prisoner complies with the terms of that provision in order to put the appropriate authorities on notice that he is proceeding thereunder. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978).

The defendant cannot complain of delay, etc. —

The delay of 121 days in bringing the defendant to trial after arrival in North Carolina was "for good cause shown," where it was due to defendant's own motion for continuance due to his inability to obtain witnesses. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978).

Agreement Inapplicable to North Carolina Prosecution of Defendant Incarcerated in North Carolina. — The Agreement on Detainers has no application to proceedings which involve a North Carolina prosecution and a defendant incarcerated in North Carolina. State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977).

Effect of Mistrial on 120-Day Limit on Article IV(c). — For case discussing the effect of a mistrial on the 120-day limit of Article IV(c) of this section, see State v. Williams, 33 N.C. App. 344, 235 S.E.2d 269 (1977).

Applied in State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978).

Cited in State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978); State v. Fate, 38 N.C. App. 68, 247 S.E.2d 310 (1978); State v. Williams, 40 N.C. App. 178, 252 S.E.2d 245 (1979).

SUBCHAPTER VIII. ATTENDANCE OF WITNESSES; DEPOSITIONS.

ARTICLE 42.

Attendance of Witnesses Generally.

§ 15A-801. Subpoena for witness.

The right to compulsory process is not absolute, and a state may require that a defendant requesting such process at state expense establish some colorable need for the person to be summoned, lest the right be abused by those who would make frivolous requests. State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978).

§ 15A-803. Attendance of witnesses.

Discretion of Court. — The use of the term "may" suggests that the granting or denial of a motion for a material witness order is a matter committed largely to the discretion of the judge. Such discretion must, however, be exercised in a manner not inconsistent with the Sixth Amendment's guaranty that a criminal defendant be afforded "compulsory process for obtaining witnesses in his favor." State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

The trial judge's denial of the defendant's motion for material witness orders to compel the attendance of New York residents who had no contact with North Carolina did not infringe

upon the defendant's Sixth Amendment right to compulsory process for obtaining witnesses in his favor. A state court need not engage in the futile issuance of ineffectual process in order to satisfy the requirements of the Fourteenth Amendment. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Limitations on Authority of Court to Compel Attendance. — There are well recognized limitations on the authority of a state court to compel the attendance of witnesses who are not residents of the state, not present therein and who lack any contact therewith. That such limitations are of constitutional stature may be inferred from the United States Supreme Court's opinions. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

The General Assembly, in enacting this section, did not seek to confer upon judges of this State the novel and seemingly unconstitutional authority to issue material witness orders to compel the attendance of New York residents who have no contact with this jurisdiction. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Where the trial court properly denied defendant's request under this section for a material witness order to compel attendance of witnesses from New York, the court was under no duty to search the statutes and suggest to defense counsel that § 15A-813 might provide a procedure for obtaining the result which he sought, but could not obtain, under this section. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Burden on Accused. — An accused may not place the burden on the officers of the law and the court to see that he procures the attendance of witnesses and makes preparation for his defense. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Cited in State v. McKoy, 294 N.C. 134, 240 S.E.2d 383 (1978); State v. McGuire, 297 N.C. 69, 254 S.E.2d 165 (1979).

ARTICLE 43.

Uniform Act to Secure Attendance of Witnesses from without a State in Criminal Proceedings.

§ 15A-811. Definitions.

Constitutionality. — The Uniform Act to secure attendance of witnesses from without a state in criminal proceedings, is constitutional. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

The provisions of this article are available to the defense as well as the prosecution. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

§ 15A-813. Witness from another state summoned to testify in this State.

Scope of Court's Duty. — Where the trial court properly denied defendant's request under § 15A-803 for a material witness order to compel attendance of witnesses from New York, the court was under no duty to search the statutes and suggest to defense counsel that this section might provide a procedure for obtaining the result which he sought, but could not obtain, under § 15A-803. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

An accused may not place the burden on the officers of the law and the court to see that he procures the attendance of witnesses and makes preparation for his defense. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Absence of Witness as Grounds for Continuance. — Ordinarily, the absence of a witness who could have been served with a subpoena does not constitute grounds for continuance. State v. Lee, 293 N.C. 570, 238 S.E.2d 299 (1977).

SUBCHAPTER IX. PRETRIAL PROCEDURE.

ARTICLE 48.

Discovery in the Superior Court.

§ 15A-901. Application of Article.

Purpose of Article. — The purpose of the discovery procedure authorized by this article was not to protect a defendant from the consequences of perjury. It was intended only to protect him from the consequences of unfair surprise and to enable him to have available at the trial any evidence which he could legitimately offer in his defense. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

Cited in State v. Mason, 295 N.C. 584, 248 S.E.2d 241 (1978).

§ 15A-902. Discovery procedure.

Waiver of Discovery. — The failure to seek discovery pursuant to the terms of this section and § 15A-903 constitutes a waiver of the right to discovery pursuant to those statutes. State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900 (1978).

Contention That Prosecution Failed to Comply with Section Held without Merit. — Where there was no showing in the record by the defendant that investigatory evidence of the prosecution not supplied to the defendant following a motion under this section was material or exculpatory, and the defendant was afforded the opportunity to cross-examine the witnesses regarding the evidence, the defendant's contention that the prosecution failed to comply with this section was without merit. State v. May, 292 N.C. 644, 235 S.E.2d 178 (1977).

Applied in State v. Gillespie, 33 N.C. App. 684, 236 S.E.2d 190 (1977); State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978); State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978).

Quoted in State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

Cited in State v. McKoy, 294 N.C. 134, 240 S.E.2d 383 (1978); State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978); State v. McCormick, 36 N.C. App. 521, 244 S.E.2d 433 (1978).

§ 15A-903. Disclosure of evidence by the State — information subject to disclosure.

Editor's Note. —

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

The common law, etc. —

Questions concerning discovery must be resolved by reference to statutes and due process principles, as no right to pretrial discovery existed at common law. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

Legislative Intent. — The intent of the legislature under subdivision (a)(2) of this section was to restrict a defendant's discovery of his oral statements to those made by him to persons acting on behalf of the State. State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979).

Meaning of "within the Possession, Custody, or Control of the State". — "Within the possession, custody, or control of the State" as used in subsections (d) and (e) of this section means within the possession, custody or control of the prosecutor or those working in conjunction with him and his office. State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979).

Waiver of Discovery. — The failure to seek discovery pursuant to the terms of § 15A-902 and this section constitute a waiver of the right to discovery pursuant to those statutes. State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900 (1978).

Defendants waived their statutory right to have the trial court order the prosecutor to permit discovery where defendants did not argue or make any other showing in support of their discovery motion at the hearing before the trial judge, no objection was made upon his conclusion that the motion had been abandoned, and the judge never ruled on the motion. State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

What Evidence Not Discoverable. — Internal police reports and memoranda pertaining to a criminal case, statements by witnesses other than the defendant and the criminal records of witnesses other than the defendant are not made

discoverable by this section. State v. Gillespie, 33 N.C. App. 684, 236 S.E.2d 190 (1977).

Same — Prior Recorded Statement of State Witness. — Standing alone, subsection (d) of this section would allow discovery of a prior recorded statement of a State witness. On its face, subsection (d) would permit the discovery of any recorded or written statement that is material to the preparation of the defense. However, the statutory scheme must be construed in its entirety. The very next section, § 15A-904, limits this section and is dispositive of the issue of prosecution witnesses' statements. Section 15A-904(a) provides that production of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State is not required. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

A trial judge's pretrial discovery order contemplating pretrial discovery by a defendant of a prosecution witness's prior statements would exceed the judge's authority. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Defendant Not Entitled to Statement of Accomplice. — Defendants in a prosecution for burglary and armed robbery were not entitled to receive a written copy of the oral statement made by an accomplice to an S.B.I. agent or a list of the State's witnesses. State v. Abernathy, 295 N.C. 147, 244 S.E.2d 373 (1978).

Defendant Not Entitled to List of Prosecution Witnesses, Their Addresses or Criminal Records. — The legislature has expressly rejected a proposal to require the State to disclose even the names and addresses of the witnesses it intends to call and also rejected a proposal to require the production of a proposed witness's criminal record. State v. Chappel, 36 N.C. App. 608, 244 S.E.2d 483, appeal dismissed, 295 N.C. 553, 248 S.E.2d 731 (1978).

North Carolina law does not grant defendant the right to discover the criminal record of a State's witness. This right did not exist at common law and this section does not grant the defendant the right to discover the names, addresses, or criminal records of the State's witnesses. State v. Ford, 297 N.C. 144, 254 S.E.2d 14 (1979).

This section affords an accused no right to discover the names and addresses of the State's witnesses and does not require the State to furnish the accused a list of the witnesses who will be called to testify against him. State v. Sledge, 297 N.C. 227, 254 S.E.2d 579 (1979).

This section does not entitle defendant to information on the internal policies of the district attorney's office. State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979).

The prosecution was not required to provide the defendant with a full written description of a "career criminal" program pursued by a district attorney's office, consisting of a policy of vigorous prosecution of repeat offenders, since these documents were not material to the preparation of the defense, intended for use by the State as evidence, or obtained from the defendant. State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979).

A district attorney's refusal to comply with a discovery order under this section does not automatically require the exclusion of the undisclosed evidence. A variety of sanctions is authorized by § 15A-910 , and the choice of which to apply—if any—rests entirely within the discretion of the trial judge. His decision will not be reversed except for abuse of that discretion. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

Right to Discovery Must Be Asserted in Trial Court to Be Passed upon on Appeal. — While this section requires the trial judge on proper motion to order the prosecutor to permit certain kinds of discovery, the right must be asserted and the issue raised before the trial court. Further, the issue must be passed upon by the trial court in order for the right to be asserted in the appellate courts. State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

Applied in State v. McCormick, 36 N.C. App. 521, 244 S.E.2d 433 (1978); State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978).

Cited in State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978); State v. Grady, 38 N.C. App. 152, 247 S.E.2d 624 (1978).

§ 15A-904. Disclosure of evidence by the State — certain reports not subject to disclosure.

Editor's Note. —

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

Certain Categories of Evidence Not Discoverable. — Discovery of internal police reports and memoranda pertaining to a criminal case, statements by witnesses other than the defendant, and the criminal records of witnesses other than the defendant are not compelled. State v. Gillespie, 33 N.C. App. 684, 236 S.E.2d 190 (1977).

Section Limits § 15A-903. — Standing alone, § 15A-903(d) would allow discovery of a prior recorded statement of a State witness. On its face, § 15A-903(d) would permit the discovery of any recorded or written statement that is material to the preparation of the defense. However, the statutory scheme must be

construed in its entirety. This section limits § 15A-903 and is dispositive of the issue of prosecution witnesses' statements. Subsection (a) of this section provides that production of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State is not required. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Trial Court Has No Authority to Order Discovery Contrary to Section. — Where a statute expressly restricts pretrial discovery, as does subsection (a) of this section, the trial court has no authority to order discovery. This holding is in accordance with the federal courts' interpretation of their analogous provisions found in Fed. R. Crim. P. 16, and the Jencks Act, 18 U.S.C. § 3500. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

A trial judge's pretrial discovery order contemplating pretrial discovery by a defendant of a prosecution witness's prior statements would exceed the judge's authority. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Identity of State Witnesses Is Shielded Prior to Trial. — Subsection (a) of this section is consistent with the legislature's desire, elsewhere expressed, to have the identity of State's witnesses shielded prior to trial. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Defendants in a prosecution for burglary and armed robbery were not entitled to receive a written copy of the oral statement made by an accomplice to an S.B.I. agent or a list of the State's witnesses. State v. Abernathy, 295 N.C. 147, 244 S.E.2d 373 (1978).

Witnesses' Statements. — The trial court's denial in a prosecution for murder of the defendant's motion to compel production of any written statements or reports made by witnesses for the State was not error since the defendant did not have any statutory right to the material requested. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

But subsection (a) does not bar discovery of prosecution witnesses' statements at trial. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977); State v. Miller, 37 N.C. App. 163, 245 S.E.2d 561 (1978).

Denial of Motion for Discovery of Witnesses' Statements at Trial Held Harmless Error. — The trial court in an armed robbery case erred in the denial of defendants' motions at trial for discovery of statements given by the State's witnesses to police regarding their descriptions of the robber; however, such error was harmless beyond a reasonable doubt where such statements were revealed to defendant during cross-examination of the police officers and were used by defendant in his cross-examination of the other State's witnesses. State v. Miller, 37 N.C. App. 163, 245 S.E.2d 561 (1978).

Election to Use Person as Witness Waives Privilege. — By electing to use a person as a witness the State waived any privilege it might have had with respect to matters covered in his testimony. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product doctrine applies in criminal as well as civil cases. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Purpose of Work Product Doctrine. — The work product doctrine was designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client's case. State v. Hardy, 193 N.C. 105, 235 S.E.2d 828 (1977).

The work product doctrine is a qualified privilege for certain materials prepared by an attorney acting on behalf of his client in anticipation of litigation. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

And Can Be Waived. — The work product privilege, like any other qualified privilege, can be waived. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product privilege is certainly waived when the defendant or the State seeks at trial to make a testimonial use of the work product. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

What Constitutes Work Product. — Only roughly and broadly speaking can a statement of a witness that is reduced verbatim to a writing or a recording by an attorney be considered work product, if at all. It is work product only in the sense that it was prepared by the attorney or his agent in anticipation of trial. Such a statement is not work product in the same sense that an attorney's impressions, opinions and conclusions or his legal theories and strategies are work product. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product doctrine has been extended to protect materials prepared for the attorney by his agents as well as those prepared by the attorney himself. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Cited in State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979).

§ 15A-906. Disclosure of evidence by the defendant — certain evidence not subject to disclosure.

The work product doctrine applies in criminal as well as civil cases. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Purpose of Work Product Doctrine. — The work product doctrine was designed to protect the mental processes of the attorney from

outside interference and provide a privileged area in which he can analyze and prepare his client's case. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

What Constitutes Work Product. — Only roughly and boardly speaking can a statement of a witness that is reduced verbatim to a writing or a recording by an attorney be considered work product, if at all. It is work product only in the sense that it was prepared by the attorney or his agent in anticipation of trial. Such a statement is not work product in the same sense that an attorney's impressions, opinions and conclusions or his legal theories and strategies are work product. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product doctrine has been extended to protect materials prepared for the attorney by his agents as well as those prepared by the attorney himself. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product doctrine is a qualified privilege for certain materials prepared by an attorney acting on behalf of his client in anticipation of litigation. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

And Can Be Waived. — The work product privilege, like any other qualified privilege, can be waived. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product privilege is certainly waived when the defendant or the State seeks at trial to make a testimonial use of the work product. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

§ 15A-907. Continuing duty to disclose.

Applied in State v. Martin, 294 N.C. 702, 242 S.E.2d 762 (1978).

Stated in State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978).

Cited in State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978).

§ 15A-908. Regulation of discovery — protective orders.

Editor's Note. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

Cited in State v. Abernathy, 295 N.C. 147, 244 S.E.2d 373 (1978).

§ 15A-910. Regulation of discovery — failure to comply.

Particular Remedy, etc. —

In accord with 4th paragraph in original. See State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978).

By its express terms, this section authorizes, but does not require, the trial court to prohibit the party offering nondisclosed evidence from introducing it. This is left to the discretion of the trial court. State v. Shaw, 293 N.C. 616, 239 S.E.2d 439 (1977).

The admission or exclusion of evidence not disclosed in accordance with a discovery order is left in the discretion of the trial court. State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978).

Imposition of these sanctions is within the discretion of the trial court. State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

The particular sanction to be imposed rests within the sound discretion of the trial court. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

And not reviewable, etc. —

In accord with original. See State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978).

Not Error to Allow Recess so Defense Counsel Could Question Witness. — Where it became evident at trial that the State had not complied with a discovery order by failing to advise defendant of tests performed on the alleged murder weapon, it was not error for the trial court to declare a recess and give defendant's attorney an opportunity to question the witness rather than to prohibit the State from introducing the evidence not disclosed. State v. Mayo, 40 N.C. App. 626, 253 S.E.2d 276 (1979).

Applied in State v. Cross, 293 N.C. 296, 237 S.E.2d 734 (1977); State v. Ruof, 296 N.C. 623, 252 S.E.2d 720 (1979).

Cited in State v. Sneed, 38 N.C. App. 230, 247 S.E.2d 658 (1978); State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978).

ARTICLE 49.

Pleadings and Joinder.

§ 15A-922. Use of pleadings in misdemeanor cases generally.

(f) Amendment of Pleadings prior to or after Final Judgment. — A statement of charges, criminal summons, warrant for arrest, citation, or magistrate's order may be amended at any time prior to or after final judgment when the amendment does not change the nature of the offense charged.

(1979, c. 770.)

Editor's Note. —

The 1979 amendment, effective October 1, 1979, inserted "citation" in subsection (f).

As the rest of the section was not changed by the amendment, only subsection (f) is set out.

§ 15A-923. Use of pleadings in felony cases and misdemeanor cases initiated in the superior court division.

The term "amendment" in subsection (e) is defined as any change in the indictment which would substantially alter the charge set forth in the indictment. State v. Carrington, 35 N.C. App. 53, 240 S.E.2d 475 (1978).

Applied in State v. Tesenair, 35 N.C. App. 531, 241 S.E.2d 877 (1978).

§ 15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to charge crime; surplusage.

Applied in State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977); State v. Saults, 294 N.C. 722, 242 S.E.2d 801 (1978); State v. Holmon, 36 N.C. App. 569, 244 S.E.2d 491 (1978).

Quoted in State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977).

Cited in State v. May, 292 N.C. 644, 235 S.E.2d 178 (1977); State v. Harris, 35 N.C. App. 401, 241 S.E.2d 370 (1978); State v. Rhyne, 39 N.C. App. 319, 250 S.E.2d 102 (1979).

§ 15A-925. Bill of particulars.

Cited in State v. May, 292 N.C. 644, 235 S.E.2d 178 (1977); State v. Harris, 35 N.C. App. 401, 241 S.E.2d 370 (1978).

§ 15A-926. Joinder of offenses and defendants.

In General. —

In accord with 13th paragraph in original. See State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977); State v. Jefferies, 41 N.C. App. 95, 254 S.E.2d 550 (1979).

In accord with 17th paragraph in original. See State v. Travis, 33 N.C. App. 330, 235 S.E.2d 66, cert. denied, 293 N.C. 163, 236 S.E.2d 707 (1977).

Consolidation Is within Discretion of Court. —

In accord with 13th paragraph in original. See State v. Greene, 294 N.C. 418, 241 S.E.2d 662 (1978).

The question of consolidating offenses arising out of a single scheme or plan ordinarily is a matter within the discretion of the trial judge and his decision will not be disturbed absent a showing of abuse of discretion. State v. Wheeler, 34 N.C. App. 243, 237 S.E.2d 874 (1977).

In the absence of a showing that the joint trial deprived defendant of a fair trial, the exercise of the trial court's discretion in ordering the consolidation will not be disturbed upon appeal. State v. Travis, 33 N.C. App. 330, 235 S.E.2d 66, cert. denied, 293 N.C. 163, 236 S.E.2d 707 (1977).

The determination of whether to consolidate charges against a defendant in a single trial is

addressed to the sound discretion of the trial judge. State v. Hairston, 36 N.C. App. 641, 244 S.E.2d 448, cert. denied, 295 N.C. 469, 246 S.E.2d 217 (1978).

The question of consolidation of charges is left to the discretion of the trial judge. State v. Jefferies, 41 N.C. App. 95, 254 S.E.2d 550 (1979).

Exercise of discretion, etc. —

In accord with 4th paragraph in original. See State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Whether defendants charged with committing identical offenses at the same time and place should be jointly or separately tried is within the sound discretion of the trial court, and the exercise of the trial court's discretion will not be disturbed on appeal absent a showing that a defendant was thereby deprived of a fair trial. State v. Pierce, 36 N.C. App. 770, 245 S.E.2d 195 (1978).

Whether the trials should be joint or separate is within the trial court's discretion, and absent a showing that joinder deprived the defendant of a fair trial the court's exercise of its discretion will not be disturbed on appeal. State v. Ervin, 38 N.C. App. 261, 248 S.E.2d 91 (1978).

This section differs from its predecessor, former § 15-152, in that it does not permit joinder on the basis that the acts were of the same class of crime or offense when there is no transactional connection, and in that it contains new language permitting joinder of offenses or crimes which are based on a series of acts or transactions "constituting parts of a single scheme or plan." State v. Greene, 294 N.C. 418, 241 S.E.2d 662 (1978).

The nature of the offenses is one of the factors which may properly be considered in determining whether certain acts or transactions constitute "parts of a single scheme or plan," as those words are used in subsection (a). State v. Greene, 34 N.C. App. 149, 237 S.E.2d 325 (1977).

Offenses of same class. —

Although this section does not permit joinder of offenses solely on the basis that they are of the same class, the nature of the offenses is one of the factors which may properly be considered in determining whether certain acts or transactions constitute "parts of a single scheme or plan," as those words are used in subsection (a) of this section. State v. Greene, 294 N.C. 418, 241 S.E.2d 662 (1978).

Judge Should Consider Whether Accused Can Be Fairly Tried. — In ruling upon a motion for joinder of offenses, the trial judge should consider whether the accused can be fairly tried if joinder is permitted. If joinder would hinder or deprive defendant of his ability to present his defense, the motion should be denied. State v. Greene, 294 N.C. 418, 241 S.E.2d 662 (1978).

Offenses Separate in Time and Place and Distinct in Circumstances. — In determining whether an accused has been prejudiced by joinder, the question is not whether the evidence at the trial of one case would be competent and admissible at the trial of the other. The question is whether the offenses are so separate in time and place and so distinct in circumstances as to render a consolidation unjust and prejudicial to defendant. State v. Greene, 294 N.C. 418, 241 S.E.2d 662 (1978).

Time for Making Order of Consolidation. — A motion for joinder of cases made orally after the present case was called for trial came too late. The motion should have been made at defendant's arraignment. Only in unusual circumstances should the judge interrupt the trial of a case to conduct hearings on matters that should have been raised and resolved at arraignment or some other pre-trial stage of the proceedings. State v. Moore, 41 N.C. App. 148, 254 S.E.2d 191 (1979).

Applied in State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978); State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

Cited in State v. Haywood, 295 N.C. 709, 249 S.E.2d 429 (1978); State v. McGuire, 297 N.C. 69, 254 S.E.2d 165 (1979).

Murder and Solicitation to Commit Murder. — This section was not applicable in prosecutions for murder and solicitation of another to commit murder where at the time of the defendant's first trial for murder no indictments had yet been returned against him for solicitation, and where there was nothing in the record to indicate that the State held the solicitation charges in reserve pending the outcome of the murder trial. State v. Furr, 292 N.C. 711, 235 S.E.2d 193 (1977).

Second-degree Murder and Misdemeanor Child Abuse. — In a prosecution for second-degree murder and misdemeanor child abuse the acts perpetrated by the defendant which led to the misdemeanor charge of child abuse were the same acts and transactions which also resulted in the death of the child. Therefore, the two offenses were properly joined under this section. State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94 (1979).

Assault with Intent to Rape on One Victim and Rape and Kidnapping of Another. — The consolidation for trial of charges of assault with intent to rape against one victim, and second-degree rape and kidnapping against another victim was within the sound discretion of the trial judge since the offenses for which defendant was tried occurred in a single afternoon within a three-hour period, with a time lapse of approximately one hour and 25 minutes between offenses, and the offenses were similar in nature and occurred within such a short time span that they could logically be considered "all parts of a continuing program of action by the defendant." State v. Greene, 34 N.C. App. 149, 237 S.E.2d 325 (1977).

Armed robbery and accessory after the fact of armed robbery are mutually exclusive offenses and not joinable for trial. State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152, appeal dismissed, 295 N.C. 649, 248 S.E.2d 253 (1978).

The offenses of armed robbery and accessory after the fact to armed robbery were not joinable under this section since the defendant had not been charged with the offense of accessory after the fact at the time of his trial for armed robbery, and since armed robbery and accessory after the fact of armed robbery are mutually exclusive offenses and not joinable for trial. State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152, appeal dismissed, 295 N.C. 649, 248 S.E.2d 253 (1978).

The mere fact that certain parts of the evidence against each defendant were inadmissible against the other would not by itself deprive either of a fair trial where they are tried jointly. State v. Pierce, 36 N.C. App. 770, 245 S.E.2d 195 (1978).

Where Witness for One Defendant was Attorney Representing Other Defendant. — There was no irreparable prejudice in the consolidation for trial of the charges against two defendants where one of the witnesses for one of the defendants was the attorney representing the other defendant. State v. Travis, 33 N.C. App. 330, 235 S.E.2d 66, cert. denied, 293 N.C. 163, 236 S.E.2d 707 (1977).

Where all of the offenses of rape were parts of a common scheme or plan and each of the defendants was present, aiding and abetting in each offense, the granting of the motion for consolidation for trial was in the sound discretion of the trial judge, and in the absence of a showing that the joint trial deprived the defendant of a fair trial, the judge's exercise of that discretion by consolidating the cases for trial would not be disturbed on appeal even though each of the successive rapes of the prosecutrix was a separate criminal offense. State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978).

§ 15A-927. Severance of offenses; objection to joinder of defendants for trial.

Discretion of Trial Judge. —

Whether the trials should be joint or separate is within the trial court's discretion, and absent a showing that joinder deprived the defendant of a fair trial the court's exercise of its discretion will not be disturbed on appeal. State v. Ervin, 38 N.C. App. 261, 248 S.E.2d 91 (1978).

Unsupported Statement of Possible Prejudice Insufficient to Show Abuse of Discretion. — Where defendant's only assertion of possible prejudice was that he might have elected to testify in one of the cases and not in the others, this unsupported statement of possible prejudice was not sufficient to show abuse of discretion on the part of the trial judge in denying defendant's motion to sever the cases for trial. State v. Sutton, 34 N.C. App. 371, 238 S.E.2d 305 (1977).

Trial Court Did Not Abuse Its Discretion. —

The trial court did not abuse its discretion in denying defendants' motions for severance or for a mistrial on the ground that they did not receive a fair and impartial trial due to the in-court outbursts of a codefendant, where, when possible, the trial judge immediately removed the members of the jury from the courtroom when an outburst occurred, and he admonished them not to deliberate on it, when it became apparent that the codefendant would continue to disrupt the proceedings despite the court's warnings, he was removed from the courtroom and at this time the court told the jury to totally disregard the whole matter, and they unanimously indicated that they could do so, and where in his final charge to the jury, the judge again instructed the jury not to allow the codefendant's behavior to influence its decision. State v. McGuire, 297 N.C. 69, 254 S.E.2d 165 (1979).

Defendant Not Prejudiced by Consolidation. — In a prosecution for rape, aggravated kidnapping and crime against nature, defendant's argument that he was prejudiced by consolidation of the cases because, had they not been consolidated, he could have elected to testify in one case if he so desired without being forced to testify in the others is without merit, since the offenses joined for trial were based on a series of acts or transactions connected together and constituted a continuing criminal episode; evidence of one offense would certainly be admissible in trials on the other offenses; defendant failed to show the manner in which his right against self-incrimination was violated; and defendant failed to move for severance at the close of all the evidence. State v. Creech, 37 N.C. App. 261, 245 S.E.2d 817, cert. denied, 295 N.C. 554, 248 S.E.2d 731 (1978).

Subsection (c)(1) of this section codifies substantially the decision in Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), which held that the receipt in evidence of the confession of one codefendant posed a substantial threat to the other codefendant's Sixth Amendment right of confrontation and cross-examination because the privilege against self-incrimination prevents

those who are implicated from calling the defendant who made the statement to the stand. State v. Johnston, 39 N.C. App. 179, 249 S.E.2d 879 (1978).

Subsection (c)(1) Inapplicable. — Where the extrajudicial statements made by accomplices implicating the defendants were admitted at trial for the purpose of corroborating the testimony of the accomplices, the accomplices were subject to cross-examination by defendants, and subsection (c)(1) of this section did not apply. State v. Johnston, 39 N.C. App. 179, 249 S.E.2d 879 (1978).

Applied in State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978); State v. Hairston, 36 N.C. App. 641, 244 S.E.2d 448 (1978); State v. Liddell, 39 N.C. App. 373, 250 S.E.2d 77 (1979); State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979).

Cited in State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977); State v. Haywood, 295 N.C. 709, 249 S.E.2d 429 (1978).

§ 15A-928. Allegation and proof of previous convictions in superior court.

Quoted in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

ARTICLE 50.

Voluntary Dismissal.

§ 15A-931. Voluntary dismissal of criminal charges by the State.

Editor's Note. —

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

Quoted in State v. Hice, 34 N.C. App. 468, 238 S.E.2d 619 (1977).

Cited in State v. Matthews, 295 N.C. 265, 245 S.E.2d 727 (1978).

ARTICLE 51.

Arraignment.

§ 15A-941. Arraignment before judge.

Cited in State v. Cross, 293 N.C. 296, 237 S.E.2d 734 (1977).

§ 15A-942. Right to counsel.

Applied in State v. Sanders, 294 N.C. 337, 240 S.E.2d 788 (1978).

§ 15A-943. Arraignment in superior court — required calendaring.

Editor's Note. —

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

Purpose of Subsection (a). — Where the trial court permitted a prosecution for armed robbery to be tried by a jury panel which had the opportunity to hear guilty pleas and the presentation of evidence and sentencing thereon in other case, the procedure followed in the trial court did not contravene the language and objectives of subsection (a) of this section and did not violate the defendant's right to be tried by an impartial jury. State v. Brown, 39 N.C. App. 548, 251 S.E.2d 706 (1979).

Legislative Intent. — The legislative intent in enacting the last sentence of subsection (a) of this section was to minimize the imposition to the time of jurors and witnesses, and not to ensure the impartiality of jurors. State v. Brown, 39 N.C. App. 548, 251 S.E.2d 706 (1979).

Subsection (b) sets forth a statutory right of each defendant "not [to] be tried without his consent in the week in which he is arraigned." State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

The last sentence of subsection (a) of this section does not indicate a legislative intent that prospective jurors not be allowed to observe proceedings involving other defendants because they might somehow become prejudiced against a defendant who might later be tried before them. State v. Brown, 39 N.C. App. 548, 251 S.E.2d 706 (1979).

Purpose of Subsection (b). — Subsection (b) is designed to ensure both the State and the defendant a sufficient interlude to prepare for trial. This is necessary because before arraignment neither the State nor defendant may know whether the case need proceed to trial. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

Subsection (b) vests a defendant with a right, for by its terms it requires his consent before a different procedure can be used. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

Prejudice Presumed from Violation of Subsection (b). — To require a defendant to show prejudice when asserting the violation of his statutory right under subsection (b), which he has insisted upon at trial, would be manifestly contrary to the intent of the legislature, which has provided that the week's time between arraignment and trial must be accorded him unless he consents to an earlier trial. Prejudice under these circumstances must necessarily be presumed. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

And Violation Is Reversible Error. — The infringement of the defendant's right under subsection (b) not to be tried without his consent during the week following his not guilty plea, where there was no waiver by defendant, was reversible error. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

But Defendant May Waive Right. — Defendant waived his statutory right not to be tried the week he was arraigned by failing to assert his right under this section in the trial court. Defendant did not move for a continuance under subsection (b) of this section and thereby consented to be tried in the same week as his arraignment. State v. Davis, 38 N.C. App. 672, 248 S.E.2d 883 (1978).

The week's interim provided in subsection (b) assures an opportunity for trial preparation and thereby helps to avoid preparation which may well be not only extensive but also unnecessary. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

The provisions of subsection (b) are more than directory. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

No Arraignment May Take Place Except at Time Calendared. — In order to effect the intent of the legislature, this statute must be construed to require not only that the solicitor "calendar arraignments" as provided but also that every arraignment be calendared and that, absent any waiver, no arraignment may take place except at a time when it is so calendared. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

Facts Showing Violation of Subsection (b). — The trial court violated the provisions of subsection (b) by proceeding with defendant's trial over his objection on the same day as his arraignment. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

The trial court violated the provisions of subsection (a) in failing to require that defendant's arraignment be calendared and held on a day provided by that subsection when no jury trial was scheduled. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

The financial interest of the State as well as the private interests of the individual jurors and witnesses are served by requiring arraignments to be calendared on days when jurors and witnesses are not called. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

Cited in State v. Shook, 38 N.C. App. 465, 248 S.E.2d 425 (1978); Ross Realty Co. v. First Citizens Bank & Trust Co., 296 N.C. 366, 250 S.E.2d 271 (1979); State v. Hunt, 297 N.C. 131, 254 S.E.2d 19 (1979).

§ 15A-945. Waiver of arraignment.

Whether a speedy trial has been afforded depends on the circumstances of each particular case, and the burden is on the defendant who asserts denial of a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. State v. Branch, 41 N.C. App. 80, 254 S.E.2d 255 (1979).

ARTICLE 52.

Motions Practice.

§ 15A-951. Motions in general; definition, service, and filing.

Applied in State v. Curmon, 295 N.C. 453, 245 S.E.2d 503 (1978); State v. Evans, 40 N.C. App. 390, 253 S.E.2d 35 (1979).

§ 15A-952. Pretrial motions; time for filing; sanction for failure to file; motion hearing date.

Oral Motion for Joinder at Trial Is Too Late. — A motion for joinder of cases made orally after the present case was called for trial came too late. The motion should have been made at defendant's arraignment. Only in unusual circumstances should the judge interrupt the trial of a case to conduct hearings on matters that should have been raised and resolved at arraignment or some other pre-trial stage of the proceedings. State v. Moore, 41 N.C. App. 148, 254 S.E.2d 191 (1979).

Applied in State v. Berry, 35 N.C. App. 128, 240 S.E.2d 633 (1978); State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978); State v. Evans, 40 N.C. App. 390, 253 S.E.2d 35 (1979).

Stated in State v. Johnson, 35 N.C. App. 729, 242 S.E.2d 517 (1978).

Cited in State v. Vincent, 35 N.C. App. 369, 241 S.E.2d 390 (1978); State v. Harris, 35 N.C. App. 401, 241 S.E.2d 370 (1978); State v. McDiarmid, 36 N.C. App. 230, 243 S.E.2d 398 (1978).

§ 15A-954. Motion to dismiss — grounds applicable to all criminal pleadings; dismissal of proceedings upon death of defendant.

Legislative Intent. — The provisions of subsection (a)(4) were intended to embody the holding in State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971). State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978); State v. Curmon, 295 N.C. 453, 245 S.E.2d 503 (1978).

Prisoners confined for unrelated crimes are entitled to the benefits of the constitutional guaranty of a speedy and impartial trial. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Every person formally accused of crime is guaranteed a speedy and impartial trial by this section and the Sixth and Fourteenth Amendments of the federal Constitution. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Since subsection (a)(4) contemplates drastic relief, a motion to dismiss under its terms should be granted sparingly. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

Burden of Proof of Denial of Speedy Trial. — The burden is on an accused who asserts denial of a speedy trial to show that the delay has prejudiced him in his ability to defend himself, and prejudice will not be presumed merely upon a showing of a long period of delay. State v. Branch, 41 N.C. App. 80, 254 S.E.2d 255 (1979).

Same — Where Delay Is for Long Period — Ordinarily, the burden is on the defendant to show that the delay was due to the willful neglect of the prosecution and could have been avoided by a reasonable effort. The courts of this State, however, have recognized an exception to this general rule where the defendant shows a long period of delay. State v. Branch, 41 N.C. App. 80, 254 S.E.2d 255 (1979).

Once the defendant showed a 17-month delay after his request for a speedy trial, the State should have presented evidence fully explaining the reasons for the delay. State v. Branch, 41 N.C. App. 80, 254 S.E.2d 255 (1979).

But the constitutional guarantee of a speedy trial does not outlaw good faith delays which are reasonably necessary for the State to prepare and present its case. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Test for Speedy Trial. —

Unless some fixed time limit is prescribed by statute, speedy trial questions must be resolved on a case-by-case basis. While all relevant circumstances must be considered, four interrelated factors are of primary significance: (1) the length of delay, (2) the reason for the delay, (3) the extent to which defendant has asserted his right, and (4) the extent to which defendant has been prejudiced. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

In determining whether an accused has been denied his right to a speedy trial, the courts have weighed four factors: (1) the length of the delay, (2) the cause of the delay, (3) waiver by the

defendant, and (4) prejudice to the defendant. State v. Branch, 41 N.C. App. 80, 254 S.E.2d 255 (1979).

Weight of Demand for Speedy Trial. — The defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

A criminal defendant who has caused or acquiesced in a delay will not be permitted to use it as a vehicle in which to escape justice. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Irreparable Prejudice Necessary to Dismissal. — It is only when one can show that there has been a constitutional violation resulting in irreparable prejudice to the preparation of defendant's case that a dismissal is warranted under subsection (a)(4). State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

Denial of Motion to Confess. — Where the trial court actually did find facts and enter conclusions of law in denying defendant's motion to suppress evidence of defendant's confessions to police, by so denying the motion to suppress, the motion to dismiss was denied, ipso facto, for there was no showing of a constitutional violation by defendant upon which to base the motion. Thus the failure of the trial judge to enter an additional order specifically denying by name the motion to dismiss would be, at most, harmless error. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

Cited in State v. Holmon, 36 N.C. App. 569, 244 S.E.2d 491 (1978); State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978); State v. Creech, 37 N.C. App. 261, 245 S.E.2d 817 (1978); State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979); State v. Stewart, 40 N.C. App. 693, 253 S.E.2d 638 (1979).

§ 15A-957. Motion for change of venue.

The burden of proof in a hearing on a motion for change of venue is upon the defendant. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

Burden of Proof Showing Prejudice. —

The burden of showing "so great a prejudice" against the defendant that he cannot obtain a fair and impartial trial is on the defendant. State v. Faircloth, 297 N.C. 100, 253 S.E.2d 890 (1979).

Defendant Must Show Likelihood That Fair Trial Will Be Prevented. — In order to prevail on a motion for change of venue, the defendant must show that there is a reasonable likelihood that the prejudicial publicity complained of will prevent a fair trial. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

Defendant Must Show Verdict Likely on Prior Conclusions. — The defendant in a prosecution for second degree murder, upon his motion for change of venue, was required to go forward with evidence tending to affirmatively show that prospective jurors in his case were reasonably likely to base their verdict upon conclusions induced by outside influences rather than upon conclusions induced solely by evidence and arguments presented in open court. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

Discretion, etc. —

In accord with 1st paragraph in original. See State v. Faircloth, 297 N.C. 100, 253 S.E.2d 890 (1979).

The decision whether to order a change of venue or a special venire rests in the discretion of the trial judge, and his decision will not be reversed except for gross abuse, such as the denial of a constitutional right. State v. Matthews, 295 N.C. 265, 245 S.E.2d 727 (1978).

The determination of whether the defendant has met his burden on a motion for change of venue rests within the sound discretion of the trial court. Absent a showing of abuse of discretion, its ruling will not be overturned on appeal. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

Accurate News Coverage of Prior Trial No Ground for Changed Venue. — The argument that news coverage which accurately reports the circumstances of a murder case and previous trial can be so innately conducive to the inciting of local prejudices as to require a change of venue is devoid of merit. State v. Matthews, 295 N.C. 265, 245 S.E.2d 727 (1978).

The fact that the defendants in a murder case were black and the victim white is not per se grounds for a change of venue or special venire. State v. Matthews, 295 N.C. 265, 245 S.E.2d 727 (1978).

No Prejudice Shown. —

A defendant has not borne his burden of showing that he will be denied an impartial jury solely by introducing evidence that his case has received widespread news coverage or that some prospective jurors have been exposed to such coverage and formed or expressed opinions based upon their exposure. The defendant must additionally show that it is reasonably likely that

prospective jurors would base their conclusions in his case upon pretrial information rather than evidence introduced at trial and would be unable to put from their minds any previous impressions they may have formed. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

Where the defendant fails to show that potential jurors would base their conclusions and verdict upon pretrial publicity and preconceived impressions, he has failed to show a reasonable likelihood that pretrial publicity will prevent a fair trial even though the case has received widespread publicity and some prospective jurors have formed or expressed opinions about the case. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

In a prosecution for second degree murder in which most of the prospective jurors stated specifically that the publicity surrounding the case would have no effect upon them and that they would base their verdict upon the evidence and give the defendant a fair trial, and the one juror who indicated he had formed a preliminary opinion concerning the case, upon further questioning, specifically stated that he could put all such opinions or predispositions from his mind and give the defendant a fair trial upon the evidence presented in open court, the trial court did not err in denying the defendant's motion for change of venue. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

Cited in State v. Hood, 294 N.C. 30, 239 S.E.2d 802 (1978).

§ 15A-959. Notice of defense of insanity; pretrial determination of insanity.

Editor's Note. —

Session Laws 1977, c. 711, s. 39 as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

For a comment discussing the insanity defense in North Carolina, see 14 Wake Forest L. Rev. 1157 (1978).

Time for Filing Notice. — Although no reference is made in subsection (a) of this section to a specific subsection of § 15A-952, it seems clear that § 15A-952(c) covers the time within which pretrial motions must be made. State v. Johnson, 35 N.C. App. 729, 242 S.E.2d 517 (1978).

Proof of Insanity Where Notice Rejected as Untimely. — Under the general plea of not guilty, a defendant may prove affirmative defenses such as insanity even if his notice under subsection (a) has been rejected as untimely. State v. Johnson, 35 N.C. App. 729, 242 S.E.2d 517 (1978).

Cited in State v. Byrd, 39 N.C. App. 659, 251 S.E.2d 712 (1979).

ARTICLE 53.

Motion to Suppress Evidence.

§ 15A-971. Definitions.

Editor's Note. —

For article discussing the search and seizure provisions of Chapter 15A, see 52 N.C.L. Rev. 277 (1973).

Failure to Pursue Federal Fourth Amendment Claims in State Court Bars Federal Habeas Corpus. — Having failed to use the opportunity for litigating his Fourth Amendment claim in State court under this Article, the defendant was foreclosed by Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), from pursuing it on federal habeas corpus. Sallie v. State, 587 F.2d 636 (4th Cir. 1978).

§ 15A-972. Motion to suppress evidence before trial in superior court in general.

Defendant Not "Aggrieved". — The defendant was not "aggrieved" within the meaning of this section in a prosecution for murder where he was not on the premises at the

time of the search and seizure, he neither owned nor rented the shed which was searched, and possession of the shotgun shells seized was not an essential element of the offense charged. State v. Alford, 38 N.C. App. 236, 247 S.E.2d 634, appeal dismissed, 295 N.C. 649, 253 S.E.2d 93 (1978).

§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.

Suppression of Evidence under Subdivision (1). — Subdivision (1) of this section mandates the suppression of evidence only when the evidence sought to be suppressed is obtained in violation of defendant's constitutional rights. State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

Failure to comply with § 15A-223(b) has no constitutional significance within the meaning of subdivision (1) of this section. State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

Defendant's confession was not required to be suppressed by subdivision (1) despite a delay in bringing the defendant before a judicial officer in violation of § 15A-501, since no constitutionally mandated exclusionary rule barred the defendant's confession. State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

The use of the term "result" in subdivision (2) indicates that a causal relationship must exist between the violation and the acquisition of the evidence sought to be suppressed. State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

Minimum Requirements of Subdivision (2). — Subdivision (2) requires, at a minimum, a "cause in fact" or "but-for" relationship between violations of this Chapter and the evidence objected to if such evidence is to be suppressed. In so holding, it is not decided that a mere "cause in fact" or "but-for" relationship is sufficient ipso facto to require exclusion of evidence obtained as a consequence of substantial violations of this Chapter. In certain cases, intervening circumstances might "dissipate the taint" of unlawfulness so that such evidence would be admissible at trial. State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

If the challenged evidence would have been obtained regardless of violation of this Chapter, such evidence has not been obtained "as a result of" such official illegality and is not, therefore, to be suppressed by reason of subdivision (2). State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

Failure of an officer to comply strictly with provisions of §§ 15A-252 and 15A-254 was not a "substantial" violation of Chapter 15A within the meaning of subdivision (2) of this section. See State v. Fruitt, 35 N.C. App. 177, 241 S.E.2d 125 (1978).

Determining Whether Violation Is "Substantial". — Evidence obtained in violation of this Chapter is required to be suppressed only if it is obtained as a result of a "substantial" violation of the provisions of the chapter. One of the critical circumstances to be considered in determining whether the violation is "substantial" is the extent to which exclusion will deter similar violations in the future. State v. Long, 37 N.C. App. 662, 246 S.E.2d 846, appeal dismissed, 295 N.C. 736, 248 S.E.2d 886 (1978).

Any violation of this Chapter occasioned by searches on military bases pursuant to proper military authority will not be deemed "substantial" within the meaning of this section since the exclusion of evidence seized in such circumstances would not in any way deter similar searches and seizures in the future. State v. Long, 37 N.C. App. 662, 246 S.E.2d 846, appeal dismissed, 295 N.C. 736, 248 S.E.2d 886 (1978).

And Such Construction Avoids Undue Conflict between State and Federal Authorities. — Construction of this section in such a manner as to hold the actions of members of the United States Air Force not to constitute "substantial" violations of the statutes, if they constitute violations of any type, has the added benefit of avoiding undue conflicts among the components of "Our Federalism." State v. Long, 37 N.C. App. 662, 246 S.E.2d 846, appeal dismissed, 295 N.C. 736, 248 S.E.2d 886 (1978).

Exclusionary Rule Applies Only to Unconstitutional Searches, Not to Those Merely Violative of Statute. — The exclusionary rule derived from Agnello v. United States, 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1925), and Walder v. United States, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954) concerning the inadmissibility for impeachment purposes of evidence unconstitutionally obtained applies, if at all, only where a search and seizure has been declared illegal for constitutional reasons. The rule would not apply in those instances where there has been a violation of the statutory procedures regulating searches and seizures contained in this Chapter, unless there has been a "substantial violation" of the statutory provisions under this section. State v. Ross, 295 N.C. 488, 246 S.E.2d 780 (1978).

Applied in State v. Sanders, 33 N.C. App. 284, 235 S.E.2d 94 (1977); State v. Brown, 35 N.C. App. 634, 242 S.E.2d 184 (1978).

Stated in State v. Boone, 293 N.C. 702, 239 S.E.2d 459 (1977).

Cited in State v. Sutton, 34 N.C. App. 371, 238 S.E.2d 305 (1977); State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978); State v. Sneed, 36 N.C. App. 341, 243 S.E.2d 908 (1978); In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

§ 15A-975. Motion to suppress evidence in superior court prior to trial and during trial.

This Article not only requires the defendant to raise his motion to suppress the evidence according to its mandate, but also places the burden on the defendant to demonstrate that he has done so. Thus, where the record reflects only general objections to the admission of the evidence obtained in a search, the defendants have waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

Defendant Waived Right to Challenge on Constitutional Grounds. — Where there was no finding by the trial court that the defendant had reasonable opportunity to move to suppress the evidence within the statutory time limit, and there was no indication in the record as to whether a motion to suppress was made at any time by the defendant, the Court of Appeals was unable to determine whether the defendant presented his objection in a timely fashion and in suitable form. The record reflecting only general objections to the admission of the evidence, the defendants waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

Applied in State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978).

Cited in State v. Bates, 37 N.C. App. 276, 245 S.E.2d 827 (1978).

§ 15A-976. Timing of pretrial suppression motion and hearing.

This Article not only requires the defendant to raise his motion to suppress the evidence according to its mandate, but also places the burden on the defendant to demonstrate that he has done so. Thus, where the record reflects only general objections to the admission of the evidence obtained in a search, the defendants have waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

Defendant Waived Right to Challenge on Constitutional Grounds. — Where there was no finding by the trial court that the defendant had reasonable opportunity to move to suppress the evidence within the statutory time limit, and there was no indication in the record as to whether a motion to suppress was made at any time by the defendant, the Court of Appeals was unable to determine whether the defendant presented his objection in a timely fashion and in suitable form. The record reflecting only general objections to the admission of the evidence, the defendants waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

Applied in State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978).

§ 15A-977. Motion to suppress evidence in superior court; procedure.

Judge as Finder of Fact. — The judge is the finder of fact at the hearing on a motion to suppress evidence and must make written findings of fact and conclusions of law. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

This Article not only requires the defendant to raise his motion to suppress the evidence according to its mandate, but also places the burden on the defendant to demonstrate that he has done so. Thus, where the record reflects only general objections to the admission of the evidence obtained in a search, the defendants have waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

Defendant Waived Right to Challenge on Constitutional Grounds. — Where there was no finding by the trial court that the defendant had reasonable opportunity to move to suppress the evidence within the statutory time limit, and there was no indication in the record as to whether a motion to suppress was made at any time by the defendant, the Court of Appeals was unable to determine whether the defendant presented his objection in a timely fashion and in suitable form. The record reflecting only general objections to the admission of the evidence, the defendants waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

Applied in State v. Martin, 38 N.C. App. 115, 247 S.E.2d 303 (1978).

Cited in State v. Boone, 293 N.C. 702, 239 S.E.2d 459 (1977); State v. Summerlin, 35 N.C. App. 522, 241 S.E.2d 732 (1978); State v. Alford, 38 N.C. App. 236, 247 S.E.2d 634 (1978).

§ 15A-978. Motion to suppress evidence in superior court or district court; challenge of probable cause supporting search on grounds of truthfulness; when identity of informant must be disclosed.

Scope of Subsection (a). — Subsection (a) of this section permits a defendant to challenge only whether the affiant acted in good faith in including the information used to establish probable cause; it does not permit a defendant to attack the factual accuracy of the information supplied by an informant to the affiant. In re Caver, 40 N.C. App. 264, 252 S.E.2d 284 (1979).

Reliability Not Relevant. — The reliability of the informant is not relevant on the question of whether subsection (b)(2) requires that his identity be disclosed. The statute only requires corroboration of the informant's existence at the time he is supposed to have given the confidential information. State v. Bunn, 36 N.C. App. 114, 243 S.E.2d 189, cert. denied, 295 N.C. 261, 245 S.E.2d 778 (1978).

Corroboration Sufficient. — Corroboration of the existence of an informant was sufficient under subsection (b)(2) where a second officer testified that he knew of the informant's existence on the day of the arrest and was well acquainted with the informant, and that the first officer correctly predicted the defendant's future behavior based upon information he said came from the informant. State v. Bunn, 36 N.C. App. 114, 243 S.E.2d 189, cert. denied, 295 N.C. 261, 245 S.E.2d 778 (1978).

Applied in State v. Sneed, 36 N.C. App. 341, 243 S.E.2d 908 (1978).

Cited in State v. Louchheim, 296 N.C. 314, 250 S.E.2d 630 (1979).

§ 15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion.

(c) An order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case. The appeal is to the appellate court that would have jurisdiction if the defendant were found guilty of the charge and received the maximum punishment. If there are multiple charges affected by a motion to suppress, the ruling is appealable to the court with jurisdiction over the offense carrying the highest punishment.

(1979, c. 723.)

Editor's Note. —

The 1979 amendment added the second and third sentences of subsection (c).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

Appeal Is to Supreme Court from Imposition of Death Penalty or Life Imprisonment. — When this section and § 7A-27(a) are considered together, it is proper to appeal directly to the Supreme Court if the punishment for the charge(s) is either death or life imprisonment. State v. Silhan, 295 N.C. 636, 247 S.E.2d 902 (1978).

Right to Appeal Final Order Denying Suppression. — When the General Assembly granted the right to appeal orders finally denying motions to suppress "upon an appeal from a judgment of conviction," it impliedly prohibited appeals from such orders at any other time. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

An order denying a defendant's motion to suppress prior to the first trial which ended in a mistrial was an order finally denying a motion to suppress evidence which could be brought forward as a part of an appeal from the later judgment of conviction in the second trial. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

Time for Review of Denial. — Unlike an order granting a motion to suppress evidence in a criminal case, which is appealable prior to trial, an order denying a defendant's motion to suppress may be reviewed only after a judgment of conviction. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

This Article not only requires the defendant to raise his motion to suppress the evidence according to its mandate, but also places the burden on the defendant to demonstrate that he has done so. Thus, where the record reflects only general objections to the admission of the evidence obtained in a search, the defendants have waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

Defendant Waived Right to Challenge on Constitutional Grounds. — Where there was no finding by the trial court that the defendant had reasonable opportunity to move to suppress the evidence within the statutory time limit, and there was no indication in the record as to whether a motion to suppress was made at any time by the defendant, the Court of Appeals was unable to determine whether the defendant presented his objection in a timely fashion and in suitable form. The record reflecting only general objections to the admission of the evidence, the defendants waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

Applied in State v. Jordan, 40 N.C. App. 412, 252 S.E.2d 857 (1979).

Cited in State v. Flynn, 33 N.C. App. 492, 235 S.E.2d 424 (1977); State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917 (1977); State v. Thomas, 34 N.C. App. 534, 239 S.E.2d 281 (1977); State v. Fruitt, 35 N.C. App. 177, 241 S.E.2d 125 (1978); State v. Paschal, 35 N.C. App. 239, 241 S.E.2d 92 (1978); State v. Odom, 35 N.C. App. 374, 241 S.E.2d 372 (1978); State v. Summerlin, 35 N.C. App. 522, 241 S.E.2d 732 (1978); State v. Bunn, 36 N.C. App. 114, 243 S.E.2d 189 (1978); State v. McLeod, 36 N.C. App. 469, 244 S.E.2d 716 (1978); State v. Alford, 38 N.C. App. 236, 247 S.E.2d 634 (1978); State v. Stinson, 39 N.C. App. 313, 249 S.E.2d 891 (1979); State v. Prevette, 39 N.C. App. 470, 250 S.E.2d 682 (1979); State v. Forrest, 41 N.C. App. 160, 254 S.E.2d 194 (1979); State v. Morris, 41 N.C. App. 164, 254 S.E.2d 241 (1979); State v. Phifer, 297 N.C. 216, 254 S.E.2d 586 (1979).

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

ARTICLE 56.

Incapacity to Proceed.

§ 15A-1001. No proceedings when defendant mentally incapacitated; exception.

Question of Capacity in Trial Judge's Discretion. — The question of defendant's capacity is within the trial judge's discretion and his determination thereof, if supported by the evidence, is conclusive on appeal. State v. Reid, 38 N.C. App. 547, 248 S.E.2d 390 (1978).

Quoted in State v. Buie, 297 N.C. 159, 254 S.E.2d 26 (1979).

§ 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

Test of Capacity to Stand Trial. — In determining a defendant's capacity to stand trial, the test is whether he has the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed. State v. Bundridge, 294 N.C. 45, 239 S.E.2d 811 (1978), decided under repealed § 122-84.

Decision Rests Within Discretion of Trial Court. — Under former § 122-91, the decision whether to grant a motion for commitment for psychiatric examination to determine competency lay within the sound discretion of the trial judge. This section contains no provision making the granting of such a motion mandatory, and the decision remains within the sound judicial discretion of the trial court. State v. Woods, 293 N.C. 58, 235 S.E.2d 47 (1977).

A defendant does not have an automatic right to a pretrial psychiatric examination and the resolution of this matter is within the trial court's discretion. State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979).

The established rule in North Carolina, unchanged by statutory enactments, is that the decision whether to grant a motion for commitment for psychiatric examination to determine competency to stand trial lies within the sound discretion of the trial judge. State v. Williams, 38 N.C. App. 183, 247 S.E.2d 620 (1978).

Although a defendant has the right to a hearing on his capacity to proceed when that question is properly raised, whether to have a defendant examined by a medical expert is within the trial court's discretion. State v. McGuire, 297 N.C. 69, 254 S.E.2d 165 (1979).

No Equal Protection Issue Presented by Denial of Request for Commitment. — Since the fact that the defendant was indigent was irrelevant to the applicability of this section, there was no equal protection issue presented where the trial court denied the defendant's request for a commitment and psychiatric examination to determine his capacity to stand trial. State v. Woods, 293 N.C. 58, 235 S.E.2d 47 (1977).

Order Declaring Defendant Incapacitated as Evidence at Subsequent Trial. — An order entered by a trial judge declaring defendant mentally incapacitated and unable to proceed to trial was some evidence of defendant's mental condition and was admissible at trial on the question of his insanity. When such evidence is admitted, the trial judge should clearly instruct the jury that this evidence is not conclusive but is merely another circumstance to be considered by the jury in reaching its decision. State v. Bundridge, 294 N.C. 45, 239 S.E.2d 811 (1978), decided under repealed § 122-84.

Requirements of subdivision (b)(3) of this section held satisfied in prosecution for armed robbery. See State v. Williams, 38 N.C. App. 183, 247 S.E.2d 620 (1978).

That Defendant Is Competent Only as Result of Medication Not Important. — Where there was competent, uncontradicted expert opinion that the defendant was capable of standing trial based on personal observation of defendant and sufficient to support the trial court's conclusion that defendant was capable of proceeding, the additional fact that defendant was competent only as a result of receiving medication did not require a different result. State v. Buie, 297 N.C. 159, 254 S.E.2d 26 (1979).

Cited in State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

§ 15A-1003. Referral of incapable defendant for civil commitment proceedings.

Examination by Physician Is Required. — When a defendant is found incapable of proceeding with a criminal trial and the trial court takes the action directed by G.S. 15A-1003(a), the examination by a qualified physician as described in G.S. 122-58.4 is required. See opinion of Attorney General to Dr. William Thomas, Chief of Adult Services, Division of Mental Health and Mental Retardation Services, 48 N.C.A.G. 1 (1978).

ARTICLE 57.

Pleas.

§ 15A-1012. Aid of counsel; time for deliberation.

Quoted in State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979).

Cited in State v. Sanders, 294 N.C. 337, 240 S.E.2d 788 (1978).

ARTICLE 58.

Procedures Relating to Guilty Pleas in Superior Court.

§ 15A-1021. Plea conference; improper pressure prohibited; submission of arrangement to judge; restitution and reparation as part of plea arrangement agreement, etc.

(d) When restitution or reparation by the defendant is a part of the plea arrangement agreement, if the judge concurs in the proposed disposition he may order that restitution or reparation be made as a condition of special probation pursuant to the provisions of G.S. 15A-1351, or probation pursuant to the provisions of G.S. 15A-1343(d). If an active sentence is imposed the court may order that the defendant make restitution or reparation out of any earnings gained by the defendant if he attains work release privileges under the

provisions of G.S. 148-33.1, or that restitution or reparation be imposed as a condition of parole in accordance with the provisions of G.S. 148-57.1. The order providing for restitution or reparation shall be in accordance with the applicable provisions of G.S. 15A-1343(d).

When restitution or reparation is ordered as a part of a plea arrangement or a condition of parole or work release privileges, the sentencing court shall enter as a part of the commitment that restitution or reparation is ordered as a part of a plea arrangement. The Administrative Office of the Courts shall prepare and distribute forms which provide for ample space to make restitution or reparation orders incident to commitments. (1973, c. 1286, s. 1; 1975, c. 117; c. 166, s. 27; 1977, c. 614, ss. 3, 4; 1977, 2nd Sess., c. 1147, s. 1.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, divided subsection (d) into two paragraphs, and, in the first paragraph, inserted "as a condition of special probation" and substituted "15A-1351" for "15-199(10)" and "15A-1343(d)" for "15-197.1" in the first sentence, inserted "probation" following "or" near the end of the first sentence and substituted "15A-1343(d)" for "15-199(10)" at the end of the third sentence. In the second paragraph of subsection (d), the amendment deleted "which forms shall be conveniently structured to enable the sentencing court to make its order" at the end of the paragraph.

As the rest of the section was not changed by the amendment, only subsection (d) is set out.

For article, "Plea Bargaining in North Carolina," see 54 N.C.L. Rev. 823 (1976).

Amendment Effective July 1, 1980. — Session Laws 1979, c. 760, s. 3, effective July 1, 1980, will amend subsection (a) of this section by adding at the end of the first sentence: "including a prison term different from the presumptive prison term applicable to the defendant, if convicted, under G.S. 15A-1340.4(f)."

Session Laws 1979, c. 760, s. 6, provides: "This act shall become effective on July 1, 1980, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Where a defendant elects not to stand by his portion of a plea agreement, the State is not bound by its agreement to forego the greater charge. State v. Fox, 34 N.C. App. 576, 239 S.E.2d 471 (1977).

Appeal to Superior Court for Trial de Novo. — Where a defendant originally charged with felonies entered guilty pleas to misdemeanors in the district court pursuant to a plea bargain with the State, but then appealed to the superior court for a trial de novo, the State was not bound by the agreement and could try the defendant upon the felony charges or any lesser included offenses. State v. Fox, 34 N.C. App. 576, 239 S.E.2d 471 (1977).

Cited in Warren v. Marion, 465 F. Supp. 303 (E.D.N.C. 1978).

§ 15A-1025. Plea discussion and arrangement inadmissible.

Editor's Note. —

For survey of 1976 case law on criminal procedure, see 55 N.C.L. Rev. 989 (1977).

For a survey of 1977 law on evidence, see 56 N.C.L. Rev. 1069 (1978).

ARTICLE 59.

Maintenance of Order in the Courtroom.

§ 15A-1031. Custody and restraint of defendant and witnesses.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Contempt, Order in the Courtroom, Mistrials," see 14 Wake Forest L. Rev. 909 (1978).

ARTICLE 61.

Granting of Immunity to Witnesses.

§ 15A-1052. Grant of immunity in court proceedings.

This section requires the trial judge to inform the jury "of the grant of immunity" and not the details of the grant. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The legislature intended for the jury to know the witness was receiving something of value in exchange for his testimony which might bear on his credibility. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Instruction Need Not Be Given Immediately before Witness's Testimony. — Nothing in this section requires the instruction in subsection (c) to be given immediately before the witness's testimony. The statute only specifies that the instruction be given "prior" to the testimony. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Instruction Given before Any Witness Called. — The trial judge's instruction as to the grant of immunity complied with the spirit as well as the letter of the law where it was given before any witnesses were called in the case, but not immediately before the witness testified. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Jury Should Be Instructed in Final Charge. — Subsection (c) clearly requires the court to instruct the jury as to the interest of the witness under the grant of immunity but "during the charge to the jury." This language means during the judge's final charge, and not in advance of the witness's testimony. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Substantial Compliance. — Where the material terms of the grant of immunity are explained to the jury, there is substantial compliance with this section and no prejudicial error. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

§ 15A-1054. Charge reductions or sentence concessions in consideration of truthful testimony.

Where Witness's Credibility Important, Jury Is Entitled to Know of Leniency Agreement. — Where the prosecutor remained silent while his witness testified that no plea arrangement had been made with the State, though he well knew that such an agreement did exist, and not only did the prosecutor allow the jury to be misled as to the witness's reasons for testifying, but by keeping him ignorant of the terms of the plea bargain, he contrived a means of ensuring that this evidence would not come before the jury, and the witness's credibility as a witness was an important issue in the case, evidence of any understanding or agreement for leniency was relevant to his credibility, and the jury was entitled to know of it. Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979).

The remedy for failure to comply with subsection (c) of this section is the granting of a recess upon motion by the defendant, rather than suppression of the testimony. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978).

ARTICLE 62.

Mistrial.

§ 15A-1061. Mistrial for prejudice to defendant.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Contempt, Order in the Courtroom, Mistrials," see 14 Wake Forest L. Rev. 909 (1978).

Mistrial Is Matter of Court's Discretion. — The decision as to whether substantial and irreparable prejudice has occurred lies within the court's discretion and, absent a showing of abuse of that discretion, the decision of the trial court will not be disturbed on appeal. State v. Mills, 39 N.C. App. 47, 249 S.E.2d 446 (1978).

The trial court did not abuse its discretion in denying defendants' motions for severance or for a mistrial on the ground that they did not receive a fair and impartial trial due to the in-court outbursts of a codefendant, where, when possible, the trial judge immediately removed the members of the jury from the courtroom when an outburst occurred, and he admonished them not to deliberate on it, when it became apparent that the codefendant would continue to disrupt the proceedings despite the court's warnings, he was removed from the courtroom and at this time the court told the jury to totally disregard the whole matter, and they unanimously indicated that they could do so, and where in his final charge to the jury, the judge again instructed the jury not to allow the codefendant's behavior to influence its decision. State v. McGuire, 297 N.C. 69, 254 S.E.2d 165 (1979).

Cited in State v. Love, 296 N.C. 194, 250 S.E.2d 220 (1978).

SUBCHAPTER XI. TRIAL PROCEDURE IN DISTRICT COURT.

ARTICLE 65.

In General.

§ 15A-1101. Applicability of superior court procedure.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article reviewing trial procedure under Subchapters XI and XII, see 14 Wake Forest L. Rev. 949 (1978).

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

ARTICLE 71.

Right to Trial by Jury.

§ 15A-1201. Right to trial by jury.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article reviewing trial procedure under Subchapters XI and XII, see 14 Wake Forest L. Rev. 949 (1978).

ARTICLE 72.

Selecting and Impaneling the Jury.

§ 15A-1211. Selection procedure generally; role of judge; challenge to the panel; authority of judge to excuse jurors.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article reviewing trial procedure under Subchapters XI and XII, see 14 Wake Forest L. Rev. 949 (1978).

In order to justify a dismissal of an indictment on grounds that statutory procedures were violated in the compilation of the jury list, a party must show either corrupt intent, discrimination, or irregularities which affect the actions of the jurors actually drawn and summoned. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978).

Mere Violation of Statutory Procedures Will Not Merit Quashing an Indictment. — In the absence of statutory language indicating that preparation of jury lists shall be void if the directions of the act be not strictly observed, a mere showing of a violation of the statutory procedures will not merit the quashing of an indictment. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978).

Absent Proof That Qualified Person Was Disqualified, Motion to Quash Is Properly Denied. — Where the testimony by the chairman of a jury commission indicated that, in certain instances, the commission did not make proper inquiry before disqualifying certain individuals, but instead simply took the sheriff on his word that such persons were disqualified, but there was no evidence indicating that persons qualified to serve were disqualified from the list, and there was no evidence that the sheriff was unlawfully delegated the responsibility, and given the final say, of determining the jury list, the trial court properly denied a motion to quash the indictment. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978).

When Findings Not Required. — In the absence of evidence that any qualified person was excluded from jury service, and in the absence of contradictory and conflicting evidence as to the material facts, the judge is not required to make findings. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978).

Even a showing that certain qualified persons were improperly disqualified, would not require a dismissal of an indictment absent a showing of corrupt intent or systematic discrimination in the compilation of the list, or a showing of the presence upon the grand jury itself of a member not qualified to serve. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978).

§ 15A-1212. Grounds for challenge for cause.

Challenges for cause are granted to ensure that defendants are tried by fair, impartial, and unbiased juries. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

Merely Having Heard Case Discussed Not Ground for Challenge for Cause. — The fact that a prospective juror had heard the case to be tried discussed previously was not determinative of his competence to serve as a member of the jury. To exclude all individuals who had prior information concerning a given case from jury duty would, in cases involving extensive publicity, often tend to require the exclusion of most individuals who regularly read newspapers or otherwise kept themselves informed as to current affairs of public note. State v. Hunt, 37 N.C. App. 315, 246 S.E.2d 159 (1978).

Employment Alone Not Grounds for Excusing Juror. — An individual should not be excused for cause solely by virtue of the nature of his employment. Such holding might well require exclusion of numerous classes of individuals solely by virtue of employment or membership in voluntary associations which were perceived as indicating some type of predisposition on the part of a prospective juror. State v. Hunt, 37 N.C. App. 315, 246 S.E.2d 159 (1978).

In a murder prosecution a prospective juror could not be excluded for cause solely by virtue of his employment as a police officer and

his exposure to some unspecified information about the case to be tried. State v. Hunt, 37 N.C. App. 315, 246 S.E.2d 159 (1978).

Juror Unable to Accept Law Is Incompetent. — A juror who reveals that he is unable to accept a particular defense or penalty recognized by law is prejudiced to such an extent that he can no longer be considered competent. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

One who is unwilling to accept as a defense, if proved, that which the law recognizes as such should be removed from the jury when challenged for cause. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

Jurors who are predisposed with regard to the law or evidence in a case are properly dismissed for cause. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

Where Court Erred in Refusing to Dismiss, a New Trial Was Required. — Where jurors in a prosecution for murder stated that they could not acquit the defendant even though her insanity was proven to them, they were committed to disregarding the evidence presented to them as well as the court's instructions on the law arising from that evidence. The failure of the court to dismiss them for cause, coupled with the subsequent exhaustion of the defendant's peremptory challenges, forced her to accept a jury which cannot be considered impartial. For this reason a new trial was required. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

§ 15A-1213. Informing prospective jurors of case.

Purpose. — The purpose of this section, when read as a whole and considered together with the Official Commentary, is to avoid giving jurors a distorted view of the case through the stilted language of indictments. State v. Laughinghouse, 39 N.C. App. 655, 251 S.E.2d 667 (1979).

The reading to the jury by the trial judge of a portion of the indictment as part of the charge after the close of the evidence was not a violation of this section where it would in no way serve the purpose of this section to avoid giving the jurors a distorted view of the case. State v. Laughinghouse, 39 N.C. App. 655, 251 S.E.2d 667 (1979).

§ 15A-1214. Selection of jurors; procedure.

Editor's Note. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

Discretion of Trial Court. — Regulation of the manner and extent of the inquiry of a prospective juror concerning his fitness rests largely in the trial court's discretion and will not be found to constitute reversible error unless harmful prejudice and clear abuse of discretion are shown. State v. Hunt, 37 N.C. App. 315, 246 S.E.2d 159 (1978).

The right of the defendant to inquire into the fitness of jurors is subject to the close supervision of the trial court, and the extent of the inquiry lies within the court's discretion. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

Reopening Examination after Impanelment. — It is well established that, prior to the impaneling of the jury, it is within the discretion of the trial judge to reopen the examination of a juror, previously passed by both the State and the defendant, and to excuse such juror upon challenge, either peremptory or for cause, and there is no reason for the termination of this discretion in the trial judge at the impanelment of the jury. State v. Kirkman, 293 N.C. 447, 238 S.E.2d 456 (1977), decided under repealed § 9-21.

The trial court should not permit counsel to question prospective jurors as to the kind of verdict they would render or how they would be inclined to vote, under a given state of facts. State v. Hunt, 37 N.C. App. 315, 246 S.E.2d 159 (1978).

The trial court properly sustained an objection to a hypothetical question which could not reasonably be expected to result in an answer bearing upon a juror's qualifications, but rather would tend to commit the juror to a decision on the performance of his duties prior to an instruction by the court with regard to their proper performance pursuant to law. State v. Hunt, 37 N.C. App. 315, 246 S.E.2d 159 (1978).

In a prosecution for murder the defendant properly preserved her exception to the court's denial of her challenge for cause by (1) exhausting her peremptory challenges and (2) thereafter asserting her right to challenge peremptorily an additional juror. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

§ 15A-1215. Alternate jurors. — (a) The judge may permit the seating of one or more alternate jurors. Alternate jurors must be sworn and seated near the jury with equal opportunity to see and hear the proceedings. They must attend the trial at all times with the jury, and obey all orders and admonitions of the judge. When the jurors are ordered kept together, the alternate jurors must be kept with them. If before final submission of the case to the jury, any juror dies, becomes incapacitated or disqualified, or is discharged for any other reason, an alternate juror becomes a juror, in the order in which selected, and serves in all respects as those selected on the regular trial panel. Alternate jurors receive the same compensation as other jurors and, unless they become jurors, must be discharged upon the final submission of the case to the jury.

(b) In all criminal actions in which one or more defendants is to be tried for a capital offense, or enter a plea of guilty to a capital offense, the presiding judge shall provide for the selection of at least two alternate jurors, or more as he deems appropriate. The alternate jurors shall be retained during the deliberations of the jury on the issue of guilt or innocence under such restrictions, regulations and instructions as the presiding judge shall direct. In case of sequestration of a jury during deliberations in a capital case, alternates shall be sequestered in the same manner as is the trial jury, but such alternates shall also be sequestered from the trial jury. In no event shall more than 12 jurors participate in the jury's deliberations. (1977, c. 711, s. 1; 1979, c. 711, s. 1.)

Editor's Note. — The 1979 amendment, effective October 1, 1979, designated the former provisions of this section as subsection (a) and added subsection (b).

§ 15A-1217. Number of peremptory challenges.

Where Death Penalty May Not Be Imposed upon Conviction, Case Is Not Capital. — If it is determined during jury selection in a prosecution for a crime which formerly had been punishable by death that the death penalty may not be imposed upon conviction, the case loses its capital nature, thereby rendering statutes providing for an increased number of peremptory challenges in capital cases inapplicable. State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978) (decided under former § 9-21).

Where the district attorney announced at the beginning of a prosecution for first-degree murder that the State would not ask for the death penalty, the case lost its "capital nature," and the court committed no error in not allowing the defendant 14 peremptory challenges. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

ARTICLE 73.

Criminal Jury Trial in Superior Court.

§ 15A-1221. Order of proceedings in jury trial; reading of indictment prohibited. — (a) The order of a jury trial, in general, is as follows:

(1) The defendant must be arraigned and must have his plea recorded, out of the presence of the prospective jurors, unless he has waived arraignment under G.S. 15A-945.

(2) The judge must inform the prospective jurors of the case in accordance with G.S. 15A-1213.

(3) The jury must be sworn, selected and impaneled in accordance with Article 72, Selecting and Impaneling the Jury.

(4) Each party must be given the opportunity to make a brief opening statement, but the defendant may reserve his opening statement.

(5) The State must offer evidence.

(6) The defendant may offer evidence and, if he has reserved his opening statement, may precede his evidence with that statement.
(7) The State and the defendant may then offer successive rebuttals as provided in G.S. 15A-1226.
(8) At the conclusion of the evidence, the parties may make arguments to the jury in accordance with the provisions of G.S. 15A-1230.
(9) The judge must deliver a charge to the jury in accordance with the provisions of G.S. 15A-1231 and 15A-1232.
(10) The jury must retire to deliberate, and alternate jurors who have not been seated must be excused as provided in G.S. 15A-1215.

(b) At no time during the selection of the jury or during trial may any person read the indictment to the prospective jurors or to the jury. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 2.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, designated the former provisions of this section as subsection (a) and added subsection (b).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

For an article reviewing trial procedure under Subchapters XI and XII, see 14 Wake Forest L. Rev. 949 (1978).

Cited in State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978); State v. Laughinghouse, 39 N.C. App. 655, 251 S.E.2d 667 (1979).

§ 15A-1222. Expression of opinion prohibited.

Editor's Note. — For article discussing North Carolina jury instruction practice, see 52 N.C.L. Rev. 719 (1974).

Judge Creates Prejudice with Opinion. — The judge prejudices a party or his cause in the minds of the trial jurors whenever he violates the statute by expressing an opinion. State v. Guffey, 39 N.C. App. 359, 250 S.E.2d 96 (1979).

There Can Be No Justification for Expression of Opinion. — The fact that an accused may be charged with a despicable crime, and the evidence of guilt may appear to be overwhelming, does not justify the expression of an opinion. State v. Guffey, 39 N.C. App. 359, 250 S.E.2d 96 (1979).

And it is immaterial how an opinion is expressed or implied, whether in the charge of the court, in the examination of a witness, in the rulings upon objections to evidence, or in any other manner. State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978).

But not every improper remark by a trial judge requires a new trial. State v. Guffey, 39 N.C. App. 359, 250 S.E.2d 96 (1979).

Judge May Question Witness. — The trial judge may direct questions to a witness for the purpose of clarifying his testimony and promoting a better understanding of it. State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978).

But questioning by the trial judge must be conducted with care and in a manner which avoids prejudice to either party. State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978).

New Trial Required. —

Where the trial judge's statement prior to trial went to the heart of the trial, assuming the defendant's guilt, a new trial was required. State v. Guffey, 39 N.C. App. 359, 250 S.E.2d 96 (1979).

Where the trial judge told the jury that he could not allow them to take certain photographs which had not been received in evidence into the jury room because the defendant did not consent, his statement was an incorrect statement of the law under § 15A-1233 which was nevertheless harmless in itself since it led to a correct ruling that the jury could not take photographs not admitted in evidence into the jury room. However, the attempt by the trial judge to explain the reason for his failure to comply with the jury's request constituted an impermissible expression of opinion in violation of this section and § 15A-1232 which required a new trial. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

Applied in State v. Moore, 37 N.C. App. 248, 245 S.E.2d 898 (1978); State v. Cody, 40 N.C. App. 735, 253 S.E.2d 642 (1979).

Stated in State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

Cited in State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978); State v. Blackmon, 38 N.C. App. 620, 248 S.E.2d 456 (1978); State v.

Francum, 39 N.C. App. 429, 250 S.E.2d 705 (1979).

§ 15A-1223. Disqualification of judge.

Failure of Judge to Disqualify Himself Not Error. — Where the trial judge at the first trial of the defendant when declaring a mistrial, ruled that the emotional outburst heard by the jury could either consciously or subconsciously prevent them from rendering a verdict solely on the evidence, but there was no evidence in the record elicited by defense counsel or any other party of any prejudice or bias displayed by the presiding judge, and no showing that in the previous trial the judge reacted strongly to the outburst, nor any showing that the judge displayed marked personal feeling toward the defendant, the failure of the trial judge to disqualify himself was not error. State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94 (1979).

§ 15A-1227. Motion for dismissal.

Editor's Note. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

Motion for Dismissal Similar to Motion for Nonsuit. — A motion for dismissal pursuant to this section tests the sufficiency of the evidence to sustain a conviction. In that respect it is identical to a motion for judgment as in the case of nonsuit under § 15-173. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

Court Limited to Determination Whether Reasonable Inference of Guilt Possible. — In ruling upon the defendant's motion to dismiss or for judgment as in the case of nonsuit, the trial court is limited solely to the function of determining whether a reasonable inference of the defendant's guilt of the crime charged may be drawn from the evidence. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

Evidence Favorable to State Considered as Whole. — In passing on a motion to dismiss or for judgment as in the case of nonsuit, evidence favorable to the State is to be considered as a whole in order to determine its sufficiency. This is especially necessary in a case when the proof offered is circumstantial, for rarely will one bit of such evidence be sufficient, in itself, to point to a defendant's guilt. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

Sufficiency, Not Weight, of Evidence Is Test. — The trial court in considering motions for nonsuit or for dismissal pursuant to this section is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

Controlling cases dealing with the sufficiency of evidence to withstand a motion for judgment as in the case of nonsuit are equally applicable to the sufficiency of the evidence to withstand a motion for dismissal pursuant to this section. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

"Substantial Evidence" Test. — The more modern cases agree that the amount of evidence required as to each essential element in order to withstand motions for judgment as in the case of nonsuit or for dismissal is controlled by the "substantial evidence" or "more than a scintilla of evidence" test. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

The "more than a scintilla of evidence" test and the "substantial evidence" test are in reality only one test which is most frequently designated the "substantial evidence test." State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

Anything more than a scintilla of evidence is "substantial evidence." State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

Requirement of Substantiality of Evidence of Element. — The requirement that the State's evidence of each element be "substantial" is simply a requirement that it be existing and real, not just seeming or imaginary. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

Reasonable Inference Warrants Sending Case to Jury. — If the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

Evidence Must Be Considered in Most Favorable Light to State. — In considering a motion for judgment as in the case of nonsuit or a motion for dismissal pursuant to this section, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

All Evidence Favorable to State Must Be Accepted as True. — All evidence admitted during the trial, whether competent or incompetent, which is favorable to the State must be taken as true, and contradictions or discrepancies therein must be resolved in the State's favor. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

Ruling on Motion Is Not Based on All Counts Taken as a Whole. — The State's argument that where a motion to nonsuit is not limited to a particular count but is addressed to all counts, the motion cannot be allowed where there is sufficient evidence to support any count was without merit. State v. Taylor, 37 N.C. App. 709, 246 S.E.2d 834, cert. denied, 295 N.C. 737, 248 S.E.2d 866 (1978).

The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

If Any Fact Reasonably Tends to Prove Fact in Issue, Case Should Go to Jury. — If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture, the case should be submitted to the jury. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

Duty of Trial Court and Jury. — It is for the trial court to determine whether substantial evidence which will support a reasonable inference of the defendant's guilt has been introduced. The trial court having found that such evidence has been introduced, it is solely for the jury to determine whether the facts taken singly or in combination satisfy them beyond a reasonable doubt that the defendant is in fact guilty. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

A motion to dismiss which is improperly phrased will not destroy reviewability on appeal. State v. Taylor, 37 N.C. App. 709, 246 S.E.2d 834, cert. denied, 295 N.C. 737, 248 S.E.2d 866 (1978).

Applied in State v. Rhyne, 39 N.C. App. 319, 250 S.E.2d 102 (1979).

§ 15A-1232. Jury instructions; explanation of law; opinion prohibited.

I. IN GENERAL.

Editor's Note. —

For article discussing North Carolina jury instruction practice, see 52 N.C.L. Rev. 719 (1974).

This Section Is Essentially Same as Former Law. — While this section restates the substance of former § 1-180, the language requiring the judge to "give equal stress to the State and defendant in a criminal action" has been omitted. Even so, as indicated by the official commentary, what was heretofore explicit is now implicit and the law remains essentially unchanged. State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

This section imposes a duty, etc. —

In accord with 4th paragraph in original. See State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900 (1978).

Judge to Abstain from Prejudicial Conduct or Language. —

As a result of his exalted station and the respect for his opinion which jurors are presumed to hold, the trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause. State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978).

The provisions of this section are mandatory, etc. —

In accord with original. See State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

And Failure to Observe, etc. —

In accord with 1st paragraph in original. See State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

Applied in State v. Moore, 37 N.C. App. 248, 245 S.E.2d 898 (1978); State v. Wilkins, 297 N.C. 237, 254 S.E.2d 598 (1979); State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979); State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94 (1979); State v. Cody, 40 N.C. App. 735, 253 S.E.2d 642 (1979).

Cited in State v. Guffey, 39 N.C. App. 359, 250 S.E.2d 96 (1979); State v. Francum, 39 N.C. App. 429, 250 S.E.2d 705 (1979).

II. OPINION OF JUDGE.

A. General Consideration.

This section forbids the judge to intimate, etc. —

In accord with 1st paragraph in original. See State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978).

It is of no consequence whether the opinion of the trial judge is conveyed to the jury directly or indirectly as every defendant in a criminal case is entitled to the trial of his case before a neutral judge and an unbiased jury. State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978).

Expression of Opinion Is Ground for New Trial. — Any intimation or expression of opinion by the trial court which prejudices the jury against the accused is ground for a new trial. State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900 (1978).

Section Not Confined to Charge. —

In accord with 1st paragraph in original. See State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978).

In accord with 5th paragraph in original. See State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978).

Motive of Judge Immaterial. —

In accord with 2nd paragraph in original. See State v. May, 292 N.C. 644, 235 S.E.2d 178 (1977).

Inadvertent Expression of Opinion. —

An expression of judicial leaning is absolutely prohibited regardless of the manner in which it is expressed, and this is so even when such expression of opinion is inadvertent. State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978).

Harmless Error. —

Not every indiscreet and improper remark by a trial judge is of such harmful effect as to require a new trial. State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978).

Weight and Sufficiency of Evidence Question for Jury. —

Whether the defendant's evidence is less credible than the State's evidence is an issue for the jury, not the trial judge. State v. Blackmon, 38 N.C. App. 620, 248 S.E.2d 456 (1978), cert. denied, 296 N.C. 412, 251 S.E.2d 471 (1979).

Credibility of Witnesses Is for Jury. —

A trial judge has the right and duty to control the examination of witnesses and to ask questions tending to clarify the witness's testimony for the jury, but in doing so, the judge must refrain from impeaching or discrediting a witness or demonstrating any hostility toward the witness. State v. Evans, 36 N.C. App. 166, 243 S.E.2d 812 (1978).

Questioning by the trial judge must be conducted with care and in a manner which avoids prejudice to either party. State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978).

The trial judge may direct questions to a witness for the purpose of clarifying his testimony and promoting a better understanding of it. State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978).

Considerations of Appellate Court. — In deciding whether the court's instructions forced a verdict or merely served as a catalyst for further deliberation, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

B. What Constitutes an Opinion.

Cumulative Effect of Errors. — It is possible that several errors, harmless in and of themselves, may combine to form an expression of opinion. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Questioning of Witnesses. —

It is proper for a trial judge to ask questions for the purpose of clarifying a witness's testimony. State v. White, 37 N.C. App. 394, 246 S.E.2d 71 (1978).

C. Illustrative Cases.

1. Remarks Held Not Erroneous.

c. Remarks Concerning Weight and Credibility of Testimony.

Instruction That Jury Could Consider Inconsistencies in Details. — An instruction to the jury that they can consider inconsistencies in details which did not pertain to the essential elements of the charges in determining the degree of credibility to be given any witness is proper. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

d. Miscellaneous Remarks.

Comment on Jury's Duty. —

The trial judge may state to the jury the ills attendant upon disagreement including the resulting expense, the length of time the case has been tried, the number of times the case has been tried and that the case will in all probability have to be tried by another jury in the event that the jury fails to agree. However, when such matters are mentioned in the court's instructions, the trial judge must make it clear to the jury that by such instruction the court does not intend that any juror should surrender his conscientious convictions or judgment. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

A strong admonition, in readily understandable language, that, if after due deliberation, any juror sincerely believed that his decision was correct he should "stick to it though (he) stand(s) alone" was amply sufficient to convey to each member of the jury that he should not surrender any conscientious conviction in order to reach a unanimous verdict. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

The isolated mention in an instruction to the jury of the expense and inconvenience of retrying a case does not warrant a new trial unless the charge as a whole coerces a verdict. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Statement of Judge's Recollection as to What Evidence Tended to Show. — The phrase, "I believe the evidence tends to show . . . ," does not constitute an expression of opinion that any particular facts had been fully proven but rather is a statement of the trial judge's recollection as to what the evidence tended to show. State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978).

If the trial judge urges a jury to agree upon a verdict, he should emphasize in language readily understood by a lay juror that he is not injecting his views into the minds of the jurors

and that he does not intend that any juror should surrender his own free will and judgment. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Absent other factors, giving an instruction urging a jury to reach a verdict before the jury commences its deliberations is not reversible error. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Chastisement of Counsel. — Where there is no reason to believe that jurors were informed of the fact that counsel had been chastised or rebuked by the trial court, no error is committed. State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900 (1978).

Remarks of the trial court clearly addressed to both the district attorney and defendant's counsel for purposes of insuring an orderly trial could not prejudice the jury against the accused and did not, therefore, constitute error. State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900 (1978).

Instruction That Injury Was Serious. — In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, an instruction that the victim's skull fracture was a serious injury did not violate this section. State v. Davis, 33 N.C. App. 262, 234 S.E.2d 762 (1977).

2. Remarks Held Erroneous.

d. Miscellaneous Remarks.

Charge Construed as Requiring Juror to Surrender Convictions. — A trial judge has no right to coerce a verdict, and a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Explanation by Judge of Reason for Failure to Comply with Jury's Request. — Where the trial judge told the jury that he could not allow them to take certain photographs which had not been received in evidence into the jury room because the defendant did not consent, his statement was an incorrect statement of the law under § 15A-1233 which was nevertheless harmless in itself since it led to a correct ruling that the jury could not take photographs not admitted in evidence into the jury room. However, the attempt by the trial judge to explain the reason for his failure to comply with the jury's request constituted an impermissible expression of opinion in violation of §§ 15A-1222 and 15A-1232 which required a new trial. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

The trial judge's remark "who cares?" after a question asked by defendant's counsel was harmless error and a prejudicial expression of opinion. State v. Tew, 38 N.C. App. 33, 247 S.E.2d 40 (1978).

III. EXPLANATION OF LAW AND EVIDENCE.

A. General Consideration of the Charge.

The charge of the court must be read as a whole. —

One of the cardinal rules governing appellate review of trial court instructions is that the charge will be read contextually and an excerpt will not be held prejudicial if a reading of the whole charge leaves no reasonable grounds to believe that the jury was misled. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Requests for Instructions. —

This section only requires that the trial court state the evidence to the extent necessary to explain the application of the law to the evidence. It is incumbent upon defense counsel who desires more extensive instructions on the evidence to request them at trial. State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979).

Errors Should Be Pointed Out at Trial. —

Objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal. State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

If objections to the review of the evidence are not timely made, they are deemed to have been waived and will not be considered on appeal. State v. Mills, 39 N.C. App. 47, 249 S.E.2d 446 (1978).

Objections to the trial court's review of the evidence must be made before the jury retires in order that the trial court may have an opportunity for correction. State v. Mills, 39 N.C. App. 47, 249 S.E.2d 446 (1978).

When counsel is unsatisfied with the summary of the evidence or contentions of the parties, in order to preserve the error, he must bring this to the court's attention before the jury is sent to deliberate on the issues. This affords the trial court the opportunity to correct any misstatements or to expand on its summary when this is deemed necessary. State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979).

B. Explanation Required.

1. In General.

Rule Stated. —

In resolving whether an instruction should be given, the facts are to be interpreted in the light most favorable to the defendant. State v. Blackmon, 38 N.C. App. 620, 248 S.E.2d 456 (1978), cert. denied, 296 N.C. 412, 251 S.E.2d 471 (1979).

Contention of Parties. —

The trial judge is not required by this section to state the contentions of litigants. State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

Failure to state the contentions of the parties is not error, but failure to give equal stress to the State and defendant in a criminal action is error. So, when the judge states the contentions of one party he must also give the pertinent contentions of the opposing party. State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

Explanation of Subordinate Features of Case. —

A substantive feature of a case is any component thereof which is essential to the resolution of the facts in issue. Evidence which does not relate to the elements of the crime itself or the defendant's criminal responsibility therefore are subordinate features of the case. State v. Atkinson, 39 N.C. App. 575, 251 S.E.2d 677 (1979).

The weight to be accorded the defendant's confessions concerns a subordinate feature of the case and is not a substantive feature thereof which requires a specific instruction in the absence of a special request. State v. Atkinson, 39 N.C. App. 575, 251 S.E.2d 677 (1979).

Failure to Give Any of Defendant's Contentions. — Prejudicial error requiring a new trial is committed when the trial judge in his charge to the jury in a criminal case gives the contentions of the State but fails to give any contentions of defendant. State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

Where the trial judge in his charge states fully the contentions of the State but fails to give any contentions of the defendant, the party whose contentions have been omitted is not required to object or otherwise bring the omission to the attention of the trial court. State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

2. Statement of Evidence.

Slight inaccuracies, etc. —

As a general rule, a misstatement of the evidence or contentions by the trial judge will not entitle a defendant to a new trial unless the defendant makes a timely objection and calls it to the attention of the judge to permit him to correct it. State v. Evans, 36 N.C. App. 166, 243 S.E.2d 812 (1978).

Recapitulation Unnecessary. —

Absent a special request, the court is not required to summarize that evidence which merely reflects upon the credibility of a given witness. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

In summarizing the evidence in his charge to the jury, a trial judge is required to state the evidence only to the extent necessary to apply the law applicable to the case. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

The trial judge is not bound to recapitulate all of the evidence. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Contentions of Parties. —

When a trial judge elects to state the contention of one party, he must equally stress the contention of the opposing party. This does not mean that the statement of contentions of the respective parties must be of equal length for where one party's evidence is meager, his contentions must be few in contrast with those of an opposing party who offers a great volume of testimony which raises many pertinent contentions. State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978).

Statement of Material Fact Not in Evidence Is Reversible Error. — Although the court ordinarily should be informed of an inaccuracy in the summary of the evidence in the charge during or at the conclusion of the instructions so that any error may be corrected, a statement of a material fact not in evidence will constitute reversible error whether or not it is called to the court's attention. State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978).

Exclusion of Objectionable Evidence. — The trial judge has the right to exclude objectionable evidence without an objection by the opposing party. However, he is prohibited from doing so in such a manner as to exhibit any hostility toward the party offering the evidence thereby expressing an opinion. State v. Evans, 36 N.C. App. 166, 243 S.E.2d 812 (1978).

Due process requires that the evidence be reviewed in a fair and impartial manner. State v. Mills, 39 N.C. App. 47, 249 S.E.2d 446 (1978).

3. Explanation of Law.

Absence of Request for Special Instructions. —

An instruction must be given on every substantive feature of the case, even in the absence of a request for such an instruction. State v. Atkinson, 39 N.C. App. 575, 251 S.E.2d 677 (1979).

The trial court need not instruct the jury with any greater particularity than is necessary to enable the jury to apply the law to the substantive features of the case arising on the evidence when the defendant makes no request for additional instructions. State v. Atkinson, 39 N.C. App. 575, 251 S.E.2d 677 (1979).

Failure to Instruct as to Law of Self-Defense. —

When the defendant's evidence, even though contradicted by the State, raises an issue of self-defense, the failure of the trial court to charge on self-defense is error. State v. Blackmon, 38 N.C. App. 620, 248 S.E.2d 456 (1978), cert. denied, 296 N.C. 412, 251 S.E.2d 471 (1979).

§ 15A-1233. Review of testimony; use of evidence by the jury.

Jury Cannot Take Materials Not Admitted in Evidence into Jury Room. — Where the trial judge told the jury that he could not allow them to take certain photographs which had not been received in evidence into the jury room because the defendant did not consent, his statement was an incorrect statement of the law under § 15A-1233 which was nevertheless harmless in itself since it led to a correct ruling that the jury could not take photographs not admitted in evidence into the jury room. However, the attempt by the trial judge to explain the reason for his failure to comply with the jury's request constituted an impermissible expression of opinion in violation of §§ 15A-1222 and 15A-1232 which required a new trial. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

This section does not grant the trial judge authority to permit the jury to take exhibits or other materials which have not been received in evidence to the jury room under any circumstances. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

§ 15A-1234. Additional instructions.

Repeated or Clarified Instructions Are Not Additional Instructions. — If the trial judge planned to give "additional instructions" in order to add to his previous charge because of omissions therein, then the judge might be required under this statute to inform the parties of the instructions he intended to give. However, when he is repeating or clarifying instructions previously given in response to the jury's question, these are not "additional instructions" as contemplated under subsection (c) of this section. State v. Farrington, 40 N.C. App. 341, 253 S.E.2d 24 (1979).

In a situation involving an exchange of questions and answers between the court and the jury, it would obviously be cumbersome, impractical and unnecessary for the court to confer with counsel before answering each question put to him by the jury. It is inconceivable that the legislature intended to require such a procedure. State v. Farrington, 40 N.C. App. 341, 253 S.E.2d 24 (1979).

§ 15A-1235. Length of deliberations; deadlocked jury.

Editor's Note. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

This section is based upon the standards approved by the American Bar Association. This enactment provides trial judges and practicing bar with clear standards for instructions urging verdicts. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Instruction on Juror's Duty. — A strong admonition, in readily understandable language, that, if after due deliberation, any juror sincerely believed that his decision was correct he should "stick to it though (he) stand(s) alone" was amply sufficient to convey to each member of the jury that he should not surrender any conscientious conviction in order to reach a unanimous verdict. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

If the trial judge urges a jury to agree upon a verdict, he should emphasize in language readily understood by a lay juror that he is not injecting his views into the minds of the jurors and that he does not intend that any juror should surrender his own free will and judgment. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

A trial judge has no right to coerce a verdict, and a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Absent other factors, giving an instruction urging a jury to reach a verdict before the jury commences its deliberations is not reversible error. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Comment on Expense of Retrying Case. — The isolated mention in an instruction to the jury of the expense and inconvenience of retrying a case does not warrant a new trial unless the charge as a whole coerces a verdict. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

The trial judge may state to the jury the ills attendant upon disagreement including the resulting expense, the length of time the case has been tried, the number of times the case has been tried and that the case will in all probability have to be tried by another jury in the event that the jury fails to agree. However, when such matters are mentioned in the court's instructions, the trial judge must make it clear to the jury that by such instruction the court does not intend that any juror should surrender his conscientious convictions or judgment. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Charge Will Be Considered as a Whole. — One of the cardinal rules governing appellate review of trial court instructions is that the charge will be read contextually and an excerpt will not be held prejudicial if a reading of the whole charge leaves no reasonable grounds to believe that the jury was misled. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

In deciding whether the court's instructions forced a verdict or merely served as a catalyst for further deliberation, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

§ 15A-1236. Admonitions to jurors; regulation and separation of jurors. — (a) The judge at appropriate times must admonish the jurors that it is their duty:

(1) Not to talk among themselves about the case except in the jury room after their deliberations have begun;

(2) Not to talk to anyone else, or to allow anyone else to talk with them or in their presence about the case and that they must report to the judge immediately the attempt of anyone to communicate with them about the case;

(3) Not to form an opinion about the guilt or innocence of the defendant, or express any opinion about the case until they begin their deliberations;

(4) To avoid reading, watching, or listening to accounts of the trial; and

(5) Not to talk during trial to parties, witnesses, or counsel.

The judge may also admonish them with respect to other matters which he considers appropriate.

(1977, 2nd Sess., c. 1147, s. 3.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, added "until they begin their deliberations" at the end of subdivision (a)(3).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Delivery of Keys by Juror to Husband. — The admonitions prescribed by this section were not required where the trial judge merely permitted the juror to step out into the courtroom, or to the door of the courtroom, and deliver a set of keys to her husband, and there was nothing to suggest that the court permitted the juror to converse with her husband concerning the case — only that the court permitted the juror to speak to her husband briefly in connection with delivering him the keys. State v. Williams, 296 N.C. 693, 252 S.E.2d 739 (1979).

§ 15A-1237. Verdict.

This section does not require that a verdict in a felonious larceny case establish the value of the allegedly stolen property. State v. Jefferies, 41 N.C. App. 95, 254 S.E.2d 550 (1979).

Quoted in State v. Nelson, 36 N.C. App. 235, 243 S.E.2d 392 (1978).

§ 15A-1240. Impeachment of the verdict.

Editor's Note. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

§ 15A-1241. Record of proceedings.

Applied in State v. Soloman, 40 N.C. App. 600, 253 S.E.2d 270 (1979).

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

ARTICLE 78.

Order of Commitment to Imprisonment.

§ 15A-1301. Order of commitment to imprisonment when not otherwise specified. — When a judicial official orders that a defendant be imprisoned he must issue an appropriate written commitment order. When the commitment is to a sentence of imprisonment, the commitment must include the identification of the offense or offenses for which the defendant was convicted and, if the sentences are consecutive, the maximum sentence allowed by law upon conviction of each offense, and, if the sentences are concurrent or consolidated, the longest of the maximum sentences allowed by law upon conviction of any of the offenses. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 4.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective Aug. 1, 1978, added the second sentence.

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

ARTICLE 80.

Defendants Found Not Guilty by Reason of Insanity.

§ 15A-1321. Civil commitment of defendants found not guilty by reason of insanity.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Instruction Required upon Request of Defendant Interposing Insanity Defense. — Upon request, a defendant who interposed a defense of insanity to a criminal charge was entitled to a jury instruction by the trial judge setting out in substance the commitment procedures outlined in repealed § 122-84.1. State v. Bundridge, 294 N.C. 45, 239 S.E.2d 811 (1978).

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

ARTICLE 81.

General Sentencing Provisions.

§ 15A-1331. Authorized sentences; conviction.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall

become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

For an article discussing the presentence diagnostic program in North Carolina, see 9 N.C. Cent. L.J. 133 (1978).

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

Quoted in State v. Vert, 39 N.C. App. 26, 249 S.E.2d 476 (1978).

§ 15A-1332. Presentence reports.

In sentencing, the trial court is not confined to the evidence relating to the offense charged. It may inquire into such matters as age, character, education, environment, habits, mentality, propensities and record of the person about to be sentenced. And the court may inquire into alleged acts of misconduct in prison. State v. Locklear, 34 N.C. App. 37, 237 S.E.2d 289, cert. denied, 293 N.C. 591, 238 S.E.2d 150 (1977), decided under former § 15-198.

§ 15A-1334. The sentencing hearing.

Editor's Note. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

But Sentencing Hearing Must Be Fair and Just. — It would be unreasonable to require that all information in a presentence report be free of hearsay. Nor should the formal rules of evidence apply to the testimony of witnesses in a sentencing hearing. But the sentencing hearing must be fair and just, and the trial court must provide the defendant with full opportunity to controvert hearsay and other representations in aggravation of punishment. State v. Locklear, 34 N.C. App. 37, 237 S.E.2d 289, cert. denied, 293 N.C. 591, 238 S.E.2d 150 (1977), decided under former § 15-198.

Different evidentiary rules govern trial and sentencing procedures. State v. Locklear, 34 N.C. App. 37, 237 S.E.2d 289, cert. denied, 293 N.C. 591, 238 S.E.2d 150 (1977), decided under former § 15-198.

The trial judge should not base his sentence solely on "unsolicited whispered representations" or "rank hearsay." State v. Locklear, 34 N.C. App. 37, 237 S.E.2d 289, cert. denied, 293 N.C. 591, 238 S.E.2d 150 (1977), decided under former § 15-198.

A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play. State v. Lane, 39 N.C. App. 33, 249 S.E.2d 449 (1978).

ARTICLE 81A.

Sentencing Persons Convicted of Felonies.

§ 15A-1340.1. Applicability of Article 81A; life sentence. — (a) This Article shall apply to the sentencing of persons convicted of felonies, as defined by G.S. 14-1.1, that occur on or after July 1, 1980. Persons sentenced to life imprisonment under Article 100, Capital Punishment, for Class A felonies, and persons sentenced under G.S. 14-1.1(a)(2) for Class B felonies that occur on or after July 1, 1980 shall not be subject to the provisions of this Article, but shall be subject to the same provisions of law as those persons convicted of felonies that occur before July 1, 1980 of the Article, notwithstanding any provision in this act to the contrary.

(b) Persons to whom this Article applies, as provided by subsection (a), shall be subject to the provisions of Article 81. They shall also be subject to the provisions of Article 83 regarding imprisonment, commitment to the Department of Correction or a local confinement facility, order of commitment,

release pending appeal, concurrent and consecutive terms of imprisonment, and calculation of terms of imprisonment, but not to the provisions of G.S. 15A-1351(b), (c), and (d) regarding minimum terms of imprisonment. (1979, c. 760, s. 2.)

Editor's Note. — Session Laws 1979, c. 760, s. 6, provides: "This act shall become effective on July 1, 1980, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 15A-1340.2. Definitions. — The following definitions apply in this Article.

(1) Convicted. — For the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest.

(2) Jail. — A jail is a local confinement facility maintained by a county as provided by G.S. 153A-218 or a district confinement facility maintained by two or more units of local government as provided by G.S. 153A-219.

(3) Jailer. — A jailer is the sheriff or other person having the care and custody of a jail as provided by G.S. 162-22 or the administrator of a district confinement facility as provided by G.S. 153A-219.

(4) Prior Conviction. — A person has received a prior conviction when he has been adjudged guilty of or has entered a plea of guilty or no contest to a criminal charge, and judgment has been entered thereon.

(5) Prison Term. — A prison term is a period of imprisonment to be served either in the custody of the Department of Correction or a jail. (1979, c. 760, s. 2.)

§ 15A-1340.3. Purposes of sentencing. — The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders who have demonstrated a propensity to commit further crimes; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior. (1979, c. 760, s. 2.)

§ 15A-1340.4. Presumptive punishment for felony other than Class A or Class B felony; prior felony convictions; consideration of aggravating and mitigating factors; written findings. — (a) If the sentencing judge imposes a prison term on a person convicted of a felony other than a Class A or Class B felony, he may suspend the sentence and place the convicted felon on probation as provided by Article 82 of this Chapter. If the convicted felon is under 21 years of age at the time of conviction and the sentencing judge elects to impose an active prison term, the judge must either sentence the felon as a committed youthful offender in accordance with Article 3B of Chapter 148 of the General Statutes and subject to the limit on the prison term provided by G.S. 148-49.14, or make a "no benefit" finding as provided by G.S. 148-49.14 and impose a regular prison term. If the judge imposes a prison term, whether or not the term is suspended and whether or not he sentences the convicted felon as a committed youthful offender, the judge must impose the presumptive prison term provided by subsection (f) of this section unless he decides to impose a longer or shorter term after consideration of aggravating and mitigating factors. In imposing a prison term on a person convicted of a felony, the sentencing judge may consider any aggravating and mitigating factors that are reasonably related to the purposes of sentencing as provided by G.S. 15A-1340.3, and must consider each of the following aggravating and mitigating factors.

(1) Aggravating factors.
a. In committing the offense, the defendant inflicted bodily injury on another person substantially in excess of the minimum amount necessary to prove the offense.
b. In committing the offense, the defendant inflicted property loss or damage substantially in excess of the minimum amount necessary to prove the offense.
c. The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants in its commission.

(2) Mitigating factors.
a. The defendant has either no record of criminal convictions or a record consisting solely of misdemeanors punishable by not more than 60 days imprisonment.
b. In committing the offense, the defendant inflicted only the minimum amount of bodily injury on another person necessary to prove the offense.
c. In committing the offense, the defendant inflicted only the minimum amount of property damage or loss necessary to prove the offense.
d. The defendant committed the offense under duress, coercion, threat, or compulsion which was insufficient to constitute a defense but significantly reduced his culpability for the offense.
e. The defendant was a passive participant or played a minor role in the commission of the offense.
f. The defendant was suffering from a mental or physical condition which was insufficient to constitute a defense but significantly reduced his culpability for the offense.
g. The defendant, because of his age or limited mental capacity, was substantially lacking in sound judgment in committing the offense.
h. The defendant has made partial or full restitution to the victim of his offense.
i. A negotiated plea and any circumstance arising from the evidence which the court deems to have mitigating value.

(b) If the judge imposes a prison term for a felony that differs from the presumptive term provided by subsection (f), whether or not the term is suspended and whether or not he sentences the convicted felon as a committed youthful offender, the judge must enter on the record findings of fact regarding all aggravating and mitigating factors on which he bases his sentence.

(c) Whether or not the sentencing judge imposes a prison term on a person convicted of a felony other than a Class A felony, he may impose a fine in accordance with G.S. 15A-1340.6.

(d) In imposing a sentence for a felony, if the sentencing judge finds a longer presumptive prison term is applicable to the defendant under subsection (f) of this section because of his prior felony convictions, the judge must enter on the record a finding as to how many and what class of prior felony convictions the defendant has received and the evidence on which his finding is based. For the purpose of determining the applicable presumptive prison term under subsection (f), prior conviction of a felony is defined as any prior conviction of a felony by a North Carolina State court or a criminal offense under the law of any other state, the District of Columbia, or the United States, that would be punishable as a felony under North Carolina law if subject to the jurisdiction of North Carolina State courts. Prior conviction of a felony shall not include any felony that is joinable, pursuant to G.S. 15A-926(a), with the felony for which the defendant is currently being sentenced, nor shall it include any prior conviction that did not occur or lead to imprisonment, probation, suspended sentence, or parole from which the offender's final discharge occurred within the 10 years immediately preceding the conviction for which the defendant is currently being sentenced.

(e) Prior convictions may be proven at the sentencing hearing. If the State introduces proof of prior convictions for sentencing purposes and does not give the defendant reasonable notice of the date and nature of such convictions before the sentencing hearing, and the defendant contests the accuracy or validity of the convictions as applied to him, he is entitled to a continuance of the sentencing hearing.

(f) Unless otherwise specified by statute, presumptive prison terms are as follows for felonies classified according to G.S. 14-1.1 and specific penalty provisions of the General Statutes. Prior felony convictions in jurisdictions other than North Carolina shall be considered Class J felonies for the purpose of this subsection.

(1) For a Class C felony, imprisonment for 20 years if the person convicted has no prior felony convictions, imprisonment for 22 years if he has one prior conviction of a Class D, E, F, G, H, I, or J felony, and imprisonment for 24 years if he has one prior conviction of a Class B or C felony or two or more prior convictions of Class D, E, F, G, H, I, or J felonies.

(2) For a Class D felony, imprisonment for 16 years if the person convicted has no prior felony convictions, imprisonment for 18 years if he has one prior conviction of a Class E, F, G, H, I, or J felony, and imprisonment for 20 years if he has one prior conviction of a Class B, C, or D felony or two or more prior convictions of Class E, F, G, H, I, or J felonies.

(3) For a Class E felony, imprisonment for 12 years if the person convicted has no prior felony convictions, imprisonment for 14 years if he has one prior conviction of a Class F, G, H, I, or J felony, and imprisonment for 16 years if he has one prior conviction of a Class B, C, D, or E felony or two or more prior convictions of Class F, G, H, I, or J felonies.

(4) For a Class F felony, imprisonment for eight years if the person convicted has no prior felony convictions, imprisonment for 10 years if he has one prior conviction of a Class G, H, I, or J felony, and imprisonment for 12 years if he has one prior conviction of a Class B, C, D, E, or F felony or two or more prior convictions of Class G, H, I, or J felonies.

(5) For a Class G felony, imprisonment for six years if the person convicted has no prior felony convictions, imprisonment for seven years if he has one prior conviction of a Class H, I, or J felony, and imprisonment for eight years if he has one prior conviction of a Class B, C, D, E, F, or G felony or two or more prior convictions of Class H, I, or J felonies.

(6) For a Class H felony, imprisonment for three years six months if the person convicted has no prior felony convictions, imprisonment for five years if he has one prior conviction of a Class I or J felony, and imprisonment for six years if he has one prior conviction of a Class B, C, D, E, F, G, or H felony or two or more prior convictions of Class H, I, or J felonies.

(7) For a Class I felony, imprisonment for two years if the person convicted has no prior felony convictions, imprisonment for 30 months if the person has one prior conviction of a Class J felony, and imprisonment for three years if he has one prior conviction of a Class B, C, D, E, F, G, H, or I felony or two or more prior convictions of Class J felonies.

(8) For a Class J felony, imprisonment for one year if the person convicted has no prior felony convictions, imprisonment for 18 months if the person has one prior conviction of a Class J felony, and imprisonment for two years if he has one prior conviction of a Class B, C, D, E, F, G, H, or I felony or two or more prior convictions of Class J felonies.

(g) For the purposes of subsection (f) of this section, felonies defined by laws now repealed shall be assigned to the class, as defined by G.S. 14-1.1, corresponding to the maximum prison terms authorized by law for those felonies when they occurred. (1979, c. 760, s. 2.)

§ 15A-1340.5. Sentencing of person convicted of repeated felony using deadly weapon. — Notwithstanding any other provision of law, any person who has been previously convicted in the courts of this State within seven years of a felony in which a deadly weapon was used, provided that the previous felony did not occur within 10 days of the second or subsequent felony, shall serve a term for the second or subsequent felony of not less than seven years in prison, excluding gain time granted under G.S. 148-13. Any person sentenced under this section shall receive a sentence of at least 14 years in the State's prison and shall be entitled to credit for good behavior under G.S. 15A-1340.7. The sentencing judge may not sentence a person sentenced under this section as a committed youthful offender and may not suspend the sentence and place the person sentenced on probation. Sentences imposed pursuant to this section shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder. (1979, c. 760, s. 2.)

§ 15A-1340.6. Fines. — In sentencing a person convicted of a felony other than a Class A or Class B felony, the sentencing judge may in his discretion impose a fine up to the maximum authorized by G.S. 14-1.1, whether or not he imposes an active or suspended prison term as provided by Article 84 of this Chapter. (1979, c. 760, s. 2.)

§ 15A-1340.7. Service of term of imprisonment; credit for good behavior; prisoner conduct rules; informing prisoner of release date; re-entry parole and committed youthful offender parole. — (a) An active term of imprisonment imposed for a felony shall be served in the custody of the Department of Correction or a jail, subject to the provisions of G.S. 15A-1352. Credit toward service of the term shall be given for time already served as provided by Article 19A of Chapter 15 of the General Statutes, and good behavior in prison or jail as provided by subsection (b) of this section. Additional credit may be given by the Department of Correction or jailer under regulations of the Secretary of Correction as provided by G.S. 148-13.

(b) A prisoner committed to the Department of Correction or a jail to serve a sentence for a felony shall receive credit for good behavior at the rate of one day deducted from his prison or jail term for each day he spends in custody without a major infraction of prisoner conduct rules. Prisoner conduct rules shall be issued by the Secretary of Correction with regard to all prisoners serving prison or jail terms for felony convictions. The rules shall clearly state types of forbidden conduct and a copy of the rules shall be given and read to each convicted prisoner upon entry into prison or jail. Infractions of the rules shall be of two types, major and minor infractions. Major infractions shall be punishable by forfeiture of specific amounts of accrued good behavior time, disciplinary segregation, loss of privileges for specific periods, demotion in custody grade, extra work duties, or reprimand. Minor infractions shall be punishable by loss of privileges for specific periods, demotion in custody grade, extra work duties, or reprimand, but not by loss of accrued good behavior time or disciplinary segregation. A prisoner charged with infraction of conduct rules shall receive notice of the charge and be afforded a hearing. The provisions of this section shall not apply to persons convicted of Class A or Class B felonies.

(c) Within 30 days of a convicted felon's entry into prison or jail to serve his sentence, the Department of Correction or jailer shall inform him in writing of the date on which he will be released if he receives the maximum amount of time off for good behavior under subsection (b) of this section, and of the date on which he will be released if he receives no such credit for good behavior.

(d) A prisoner committed to the Department of Correction or a jail to serve a sentence imposed for a felony is eligible for re-entry parole as provided by Article 85A of Chapter 15A of the General Statutes, and, if sentenced as a

committed youthful offender, to parole as provided by Articles 3B and 4 of Chapter 148 of the General Statutes. (1979, c. 760, s. 2.)

ARTICLE 82.

Probation.

§ 15A-1341. Probation generally. — (a) Use of Probation. — A person who has been convicted of any noncapital criminal offense not punishable by a minimum term of life imprisonment or a minimum term without benefit of probation may be placed on probation as provided by this Article.

(b) Supervised and Unsupervised Probation. — The court may place a person on supervised or unsupervised probation. A person on unsupervised probation is subject to all incidents of probation except supervision by or assignment to a probation officer.

(1977, 2nd. Sess., c. 1147, ss. 4A, 5.)

Editor's Note. —

The 1977 2nd Sess., amendment, effective July 1, 1978, inserted "or a minimum term without benefit of probation" and substituted "by" for "in" preceding "this Article" in subsection (a) and inserted "or assignment to" in the second sentence of subsection (b).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

As subsection (c) was not changed by the amendment, it is not set out.

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

For a note discussing the application of the warrant requirement for parolee searches, see 14 Wake Forest L. Rev. 1207 (1978).

§ 15A-1342. Incidents of probation.

(d) Mandatory Review of Probation. — Each probation officer must bring the cases of each probationer assigned to him before a court with jurisdiction to review the probation when the probationer has served three years of a probationary period greater than three years. The probation officer must give reasonable notice to the probationer, and the probationer may appear. The court must review the case file of a probationer so brought before it and determine whether to terminate his probation.

(e) Out-of-State Supervision. — Supervised probationers are subject to out-of-State supervision under the provisions of G.S. 148-65.1.

(1977, 2nd Sess., c. 1147, ss. 6, 7.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "the cases of each probationer" for "all probationers" in the first sentence and added the second sentence of subsection (d) and added "Supervised" at the beginning of subsection (e).

As the rest of the section was not changed by the amendment, only subsections (d) and (e) are set out.

For a note discussing the application of the warrant requirement for parolee searches, see 14 Wake Forest L. Rev. 1207 (1978).

§ 15A-1343. Conditions of probation.

(b) Appropriate Conditions. — When placing a defendant on probation, the court may, as a condition of the probation, require that during the period of probation the defendant comply with one or more of the following conditions:

(1) Not commit any criminal offense.

(2) Work faithfully at suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment.

(3) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(4) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on probation.

(5) Support his dependents and meet other family responsibilities.

(6) Make restitution or reparation as provided in subsection (d).

(7) Pay a fine authorized by Article 84, Fines.

(8) Refrain from possessing a firearm or destructive device or other dangerous weapon unless granted written permission by the court or the probation officer.

(9) Report to a probation officer at reasonable times and in a reasonable manner, as directed by the court or the probation officer.

(10) Permit the probation officer to visit him at reasonable times at his home or elsewhere.

(11) Remain within the jurisdiction of the court, unless granted permission to leave by the court or the probation officer.

(12) Answer all reasonable inquiries by the probation officer and obtain prior approval from the probation officer for any change in address or employment.

(13) Promptly notify the probation officer of any change in address or employment.

(14) Repealed by Session Laws 1979, c. 662, s. 2, effective October 1, 1979.

(15) Submit at reasonable times to warrantless searches by a probation officer of his person, and of his vehicle and premises while he is present, for purposes reasonably related to his probation supervision. The court may not require as a condition of probation that the probationer submit to any other search that would otherwise be unlawful.

(16) Submit to imprisonment required for special probation under G.S. 15A-1351(a) or G.S. 15A-1344(e).

(16a) Within the first 30 days of his probation, visit, with his probation officer, a prison unit maintained by the Department of Correction for a tour thereof so that he may better appreciate the consequences of probation revocation.

(17) Satisfy any other conditions reasonably related to his rehabilitation.

(d) Restitution as a Condition of Probation. — As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses for which the defendant has been convicted. When restitution or reparation is a condition imposed, the court shall take into consideration the resources of the defendant, his ability to earn, his obligation to support dependents, and such other matters as shall pertain to his ability to make restitution or reparation. The amount must be limited to that supported by the record, and the court may order partial restitution or reparation when it appears that the damage or loss caused by the offense or offenses is greater than that which the defendant is able to pay. The court shall fix the manner of performing the restitution or reparation, and in doing so, the court may take into consideration the recommendation of the probation officer. An order providing for restitution or reparation shall in no way abridge the right of any aggrieved party to bring a civil action against the defendant for money damages arising out of the offense or offenses committed

by the defendant, but any amount paid by the defendant under the terms of an order as provided herein shall be credited against any judgment rendered against the defendant in such civil action. As used herein, "restitution" shall mean compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action. As used herein, "reparation" shall include but not be limited to the performing of community services, volunteer work, or doing such other acts or things as shall aid the defendant in his rehabilitation. As used herein, "aggrieved party" shall include individuals, firms, corporations, associations or other organizations, and government agencies, whether federal, State or local. Provided, that no government agency shall benefit by way of restitution or reparation except for particular damage or loss to it over and above its normal operating costs. Provided further, that no third party shall benefit by way of restitution or reparation as a result of the liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant. Restitution or reparation measures are ancillary remedies to promote rehabilitation of criminal offenders and to provide for compensation to victims of crime, and shall not be construed to be a fine or other punishment as provided for in the Constitution and laws of this State.

(e) Costs of Court and Appointed Counsel. — Unless the court finds there are extenuating circumstances, any person placed upon supervised or unsupervised probation under the terms set forth by the court shall, as a condition of probation, be required to pay all court costs and costs for appointed counsel or public defender in the case in which he was convicted. The court shall determine the amount due and the method of payment.

(f) Supervision Fee. — When any person is placed upon supervised probation, the court may require, as a condition of probation, that such person pay, during his probationary period, a monthly supervision fee of ten dollars ($10.00) to the clerk of superior court designated by the court. The probation officer shall not be required to collect the supervision fee. Any clerk of superior court receiving such a fee shall transmit this money to the State of North Carolina to be deposited in the General Fund. In no event shall a person placed upon supervised probation be required to pay more than one monthly supervision fee. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 8-10; 1979, c. 662, s. 1, c. 801, s. 3.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, rewrote subdivision (6) of subsection (b), added subdivision (16a) to subsection (b) and added subsection (d).

The first 1979 amendment, effective October 1, 1979, repealed subdivision (14) of subsection (b), which read: "Pay court costs and costs for appointed counsel or public defender to represent him in the case in which he was convicted," and added subsection (e).

The second 1979 amendment, effective Jan. 1, 1980, and applicable to persons placed on probation on and after that date, added subsection (f).

Session Laws 1979, c. 662, s. 3, provides that the act shall apply to any person placed on probation on or after its effective date. [October 1, 1979].

As the rest of the section was not changed by the amendments, only subsections (b), (d), (e) and (f) are set out.

For a note discussing the application of the warrant requirement for parolee searches, see 14 Wake Forest L. Rev. 1207 (1978).

Amendment Effective July 1, 1980. — Session Laws 1979, c. 830, s. 12, effective July 1, 1980, will add to subsection (b) of this section a new subdivision (16b), reading as follows:

"(16b) Compensate the Department of Natural Resources and Community Development or the North Carolina Wildlife Resources Commission, as the case may be, for the replacement costs of any marine and estuarine resources or any wildlife resources which were taken, injured, removed, harmfully altered, damaged, or destroyed as a result of a criminal offense of which the defendant was convicted. If any investigation is required by officers or agents of the Department of Natural Resources and Community Development or the Wildlife Resources Commission in determining the extent of the destruction of resources involved, the court may include compensation of the agency for investigative costs as a condition of probation. This subdivision does not

apply in any case governed by G.S. 143-215.3(a)(7)."

Reparation of injuries. —

The purpose of §§ 148-33.2 and 15A-1343(b)(6) is rehabilitation and not additional penalty or punishment, and the sum ordered or recommended must be reasonably related to the damages incurred. If the trial evidence does not support the amount ordered or recommended, then supporting evidence should be required in the sentencing hearing. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

Together §§ 148-33.2(c) and 15A-1343(b)(6) require that any order or recommendation of the sentencing court for restitution or restoration to the aggrieved party as a condition of attaining work-release privileges must be supported by the evidence. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

Condition of Consent to Warrantless Search. —

Where subdivision (b)(15) was inapplicable because the defendant was convicted before the effective date of this section, waiver by the defendant of his constitutional right against a search without a warrant by a law enforcement officer was a valid condition of the suspension of his sentence and probation. State v. Moore, 37 N.C. App. 729, 247 S.E.2d 250 (1978).

Quoted in State v. Grant, 40 N.C. App. 58, 252 S.E.2d 98 (1979).

Stated in In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Cited in State v. Lambert, 40 N.C. App. 418, 252 S.E.2d 855 (1979).

§ 15A-1344. Response to violations; alteration and revocation. — (a) Authority to Alter or Revoke. — Except as provided in subsection (b), probation may be reduced, terminated, continued, extended, modified, or revoked by any judge entitled to sit in the court which imposed probation and who is resident or presiding in the district where the sentence of probation was imposed, where the probationer violates probation, or where the probationer resides. The district attorney of the district in which probation was imposed must be given reasonable notice of any hearing to affect probation substantially.

(c) Procedure on Altering or Revoking Probation; Returning Probationer to District Where Sentenced. — When a judge reduces, terminates, extends, modifies, or revokes probation outside the county where the judgment was entered, the clerk must send a copy of the order and any other records to the court where probation was originally imposed. A court on its own motion may return the probationer to the district where probation was imposed or where the probationer resides for reduction, termination, continuation, extension, modification, or revocation of probation. In cases where the probation is revoked in a county other than the county of original conviction, the clerk in such county revoking probation shall file the Order of Revocation, which shall constitute sufficient permanent record of the proceedings in that court, and shall send one copy of the order revoking probation to the North Carolina Department of Correction to serve as a temporary commitment, and shall send the original order revoking probation and all other papers pertaining thereto, to the county of original conviction to be filed with the original records; the clerk of the county of original conviction shall then issue a formal commitment to the North Carolina Department of Correction.

(d) Extension and Modification; Response to Violations. — At any time prior to the expiration or termination of the probation period, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. The probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation. The hearing may be held in the absence of the defendant, if he fails to appear for the hearing after a reasonable effort to notify him. If a defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345, may continue him on probation, with or without modifying the conditions, may place the defendant on special

probation as provided in subsection (e), or, if continuation, modification, or special probation is not appropriate, may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing; provided that probation may not be revoked solely for conviction of a misdemeanor unless it is punishable by imprisonment for more than 30 days. The court, before activating a sentence to imprisonment established when the defendant was placed on probation, may reduce the sentence. A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period.

(e) Special Probation in Response to Violation. — When a defendant has violated a condition of probation, the court may modify his probation to place him on special probation as provided in this subsection. In placing him on special probation, the court may continue or modify the conditions of his probation and in addition require that he submit to a period or periods of imprisonment, either continuous or noncontinuous, at whatever time or intervals within the period of probation the court determines. In addition to any other conditions of probation which the court may impose, the court shall impose, when imposing a period or periods of imprisonment as a condition of special probation, the condition that the defendant obey the Rules and Regulations of the Department of Correction governing conduct of inmates, and this condition shall apply to the defendant whether or not the court imposes it as a part of the written order. If imprisonment is for continuous periods, the confinement may be in either the custody of the Department of Correction or a local confinement facility. Noncontinuous periods of imprisonment under special probation may only be served in a designated local confinement or treatment facility. The total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed six months or one fourth the maximum penalty allowed by law for the offense, whichever is less. No confinement other than an activated suspended sentence may be required beyond the period of probation or beyond two years of the time the special probation is imposed, whichever comes first.

(1977, 2nd Sess., c. 1147, ss. 11, 11A, 13A; 1979, c. 749, ss. 1-3.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "of any hearing to affect probation substantially" for "if the hearing is to be held in any other district" at the end of subsection (a), added the proviso to the present fourth sentence of subsection (d) and substituted "continuous" for "consecutive" and "noncontinuous" for "nonconsecutive" throughout subsection (e).

The 1979 amendment added the third sentence of subsection (c), the second sentence of subsection (d), and the third sentence of subsection (e).

As the rest of the section was not changed by the amendment, only subsections (a), (c), (d) and (e) are set out.

§ 15A-1345. Arrest and hearing on probation violation. — (a) Arrest for Violation of Probation. — A probationer is subject to arrest for violation of conditions of probation by a law-enforcement officer or probation officer upon either an order for arrest issued by the court or upon the written request of a probation officer, accompanied by a written statement signed by the probation officer that the probationer has violated specified conditions of his probation. However, a probation revocation hearing under subsection (e) may be held without first arresting the probationer.

(c) When Preliminary Hearing on Probation Violation Required. — Unless the hearing required by subsection (e) is first held or the probationer waives the hearing, a preliminary hearing on probation violation must be held within seven working days of an arrest of a probationer to determine whether there is

probable cause to believe that he violated a condition of probation. Otherwise, the probationer must be released four working days after his arrest to continue on probation pending a hearing.

(d) Procedure for Preliminary Hearing on Probation Violation. — The preliminary hearing on probation violation must be conducted by a judge who is sitting in the county where the probationer was arrested or where the alleged violation occurred. If no judge is sitting in the county where the hearing would otherwise be held, the hearing may be held anywhere in the judicial district. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. At the hearing the probationer may appear and speak in his own behalf, may present relevant information, and may, on request, personally question adverse informants unless the court finds good cause for not allowing confrontation. Formal rules of evidence do not apply at the hearing. If probable cause is found or if the probable cause hearing is waived, the probationer may be held for a revocation hearing, subject to release under the provisions of subsection (b). If the hearing is held and probable cause is not found, the probationer must be released to continue on probation.

(1977, 2nd Sess., c. 1147, ss. 12, 13; 1979, c. 749, s. 4.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, inserted "by a law-enforcement officer or probation officer" in the first sentence of subsection (a) and substituted "the alleged violation occurred" for "probation was imposed" at the end of the first sentence of subsection (d).

The 1979 amendment substituted "seven" for "five" near the middle of the first sentence of subsection (c).

As the rest of the section was not changed by the amendments, only subsections (a), (c) and (d) are set out.

Procedure in This Section Should Be Followed Rather Than Contempt Proceeding. — When a probationer is charged with violating a condition of his probation, the procedure provided in this section should be followed rather than a proceeding to hold him in contempt. State v. Golden, 40 N.C. App. 37, 251 S.E.2d 875 (1979).

Warrantless Arrest of Probationer. — If a simple conclusory statement from the probation officer, containing no factual allegations, is sufficient to permit another officer to arrest a probationer without a warrant, then it is reasonable to conclude that §§ 15-205 and 15A-1345 read together, give the probation officer the authority to arrest a probationer under his supervision for violations of conditions of probation without a warrant or other written document. State v. Waller, 37 N.C. App. 133, 245 S.E.2d 808 (1978).

Sufficient Notice of Intent to Pray Revocation of Sentence Suspension. — Defendant was given sufficient notice of the State's intent to pray revocation of the suspension of his sentence for abandonment and nonsupport of his wife and children, where the warrant providing the basis for the revocation hearing stated that the defendant had failed to comply with a support order and was in arrears in the amount of $690. State v. Hodges, 34 N.C. App. 183, 237 S.E.2d 576 (1977), decided under former § 15-200.1.

§ 15A-1347. Appeal from revocation of probation or imposition of special probation upon violation. — When a district court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, the defendant may appeal to the superior court for a de novo revocation hearing. At the hearing the probationer has all rights and the court has all authority they have in a revocation hearing held before the superior court in the first instance. Appeals from lower courts to the superior courts from judgments revoking probation may be heard in term or out of term, in the county or out of the county by the resident superior court judge of the district or the superior court judge assigned to hold the courts of the district, or a judge of the superior court commissioned to hold court in the district, or a special superior court judge residing in the district. When the defendant appeals to the superior court because a district court has found he violated probation and has activated his sentence or imposed special probation, and the superior court, after a de novo revocation hearing, orders that the defendant continue on probation under the

same or modified conditions, the superior court is considered the court that originally imposed probation with regard to future revocation proceedings and other purposes of this Article. When a superior court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, either in the first instance or upon a de novo hearing after appeal from a district court, the defendant may appeal under G.S. 7A-27. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 14.)

Editor's Note. —
The 1977, 2nd Sess., amendment, effective July 1, 1978, added the fourth sentence.

ARTICLE 83.

Imprisonment.

§ 15A-1351. Sentence of imprisonment; incidents; special probation. — (a) The judge may sentence a defendant convicted of an offense for which the maximum penalty does not exceed 10 years to special probation. Under a sentence of special probation, the court may suspend the term of imprisonment and place the defendant on probation as provided in Article 82, Probation, and in addition require that the defendant submit to a period or periods of imprisonment in the custody of the Department of Correction or a designated local confinement or treatment facility at whatever time or intervals within the period of probation, consecutive or nonconsecutive, the court determines. In addition to any other conditions of probation which the court may impose, the court shall impose, when imposing a period or periods of imprisonment as a condition of special probation, the condition that the defendant obey the Rules and Regulations of the Department of Correction governing conduct of inmates, and this condition shall apply to the defendant whether or not the court imposes it as a part of the written order. If imprisonment is for continuous periods, the confinement may be in the custody of either the Department of Correction or a local confinement facility. Noncontinuous periods of imprisonment under special probation may only be served in a designated local confinement or treatment facility. The total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed six months or one fourth the maximum penalty allowed by law for the offense, whichever is less, and no confinement other than an activated suspended sentence may be required beyond two years of conviction. In imposing a sentence of special probation, the judge may credit any time spent committed or confined, as a result of the charge, to either the suspended sentence or to the imprisonment required for special probation. The period of probation, including the period of imprisonment required for special probation, may not exceed five years. The court may revoke, modify, or terminate special probation as otherwise provided for probationary sentences.

(b) A sentence to imprisonment must impose maximum term and may impose a minimum term. The judgment may state the minimum term or may state that a term constitutes both the minimum and maximum terms. The fact that the punishment provision for any crime defined by the General Statutes may prescribe a minimum and maximum period within which the court, if imposing an active sentence, must sentence to imprisonment for a violation of that provision of the General Statutes shall not prevent the imposition by the court of only a maximum sentence in those instances. If the judgment states no minimum term, the defendant becomes eligible for parole in accordance with G.S. 15A-1371(a).

(c) Repealed by Session Laws 1979, c. 749, s. 7.

(e) Youthful Offenders. — If an offender is under the age of 21 years at the time of conviction, the court may sentence the offender as a youthful offender under the provisions of Article 3B of Chapter 148 of the General Statutes.

(g) Credit. — Credit towards a sentence to imprisonment is as provided in Article 19A of Chapter 15 of the General Statutes. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 15-17; 1979, c. 749, ss. 5-7.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, added the present fourth and fifth sentences of subsection (a), substituted "Article 3B" for "Article 3A" in subsection (e) and added subsection (g).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

The 1979 amendment added the third sentences in subsections (a) and (b) and repealed subsection (c), which authorized a superior or district court judge to remove or reduce an imposed minimum term upon motion of the Department of Correction and Parole Commission.

As the rest of the section was not changed by the amendment, only subsections (a), (b), (c), (e) and (g) are set out.

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

Cited in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

Amendment Effective July 1, 1980. — Session Laws 1979, c. 760, s. 4, will amend subsections (b) and (d) to read as follows:

"(b) Sentencing of a person convicted of a felony that occurred on or after the effective date of Article 81A of this Chapter is subject to that Article; a minimum term of imprisonment shall not be imposed on such a person. With regard to convicted persons not subject to Article 81A, a sentence to imprisonment must impose a maximum term and may impose a minimum term. The judgment may state the minimum term or may state that a term constitutes both the minimum and maximum terms. If the judgment states no minimum term, the defendant becomes eligible for parole in accordance with G.S. 15A-1371(a).

"(d) Alternative to Minimum Term. — In lieu of imposing a minimum term, the court may recommend to the Parole Commission a minimum period of imprisonment the offender should serve before being granted parole. The recommendation has the effect provided in G.S. 15A-1371(c). This subsection shall not apply to a person convicted of a felony that occurred on or after the effective date of Article 81A of this Chapter."

Session Laws 1979, c. 760, s. 6, provides: "This act shall become effective on July 1, 1980, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 15A-1352. Commitment to Department of Correction or local confinement facility. — (a) A person sentenced to imprisonment for a misdemeanor under this Article or for nonpayment of a fine under Article 84 of this Chapter shall be committed for the term designated by the court to the custody of the Department of Correction or to a local confinement facility. If the sentence imposed for a misdemeanor is for a period of 180 days or less, the commitment must be to a facility other than one maintained by the Department of Correction, except as provided in G.S. 148-32.1(b).

(b) A person sentenced to imprisonment for a felony under this Article shall be committed for the term designated by the court to the custody of the Department of Correction; except that, upon request of the sheriff or the board of commissioners of a county, the presiding judge may, in his discretion, sentence the person to a local confinement facility in that county.

(c) A person sentenced to imprisonment for nonpayment of a fine under Article 84, Fines, shall be committed for the term designated by the court:

(1) To the custody of the Department of Correction if the person was fined for conviction of a felony;
(2) To the custody of the Department of Correction or to a local confinement facility if the person was fined for conviction of a misdemeanor, provided that if the sentence imposed is for a period of 180 days or less, the commitment shall be to a facility other than one maintained by the Department of Correction, except as provided in G.S. 148-32.1(b). (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 18; 1979, c. 456, s. 1; c. 787, ss. 1, 2.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "of 180 days or less" for "less than 180 days" and added "except as provided in G.S. 148-32.1(b)" in the second sentence of the section as it stood before the 1979 amendments, which sentence was similar to the second sentence of present subsection (a).

The first 1979 amendment rewrote this section.

The second 1979 amendment inserted "or for nonpayment of a fine under Article 84 of this Chapter" in the first sentence of subsection (a) and added at the end of subsection (b) the language beginning "except that."

Session Laws 1979, c. 456, s. 2, provides: "This act is effective upon ratification and applies to all persons sentenced on or after that date." The act was ratified April 24, 1979.

§ 15A-1353. Order of commitment when imprisonment imposed; release pending appeal.

(c) Unless a later time is directed in the order of commitment, or the defendant has been released from custody pursuant to Article 26, Bail, or the defendant is appealing from a judgment of the district court to the superior court for a trial de novo, the sheriff must cause the defendant to be placed in the custody of the agency specified in the judgment on the day service of sentence is to begin or as soon thereafter as practicable.
(1979, c. 758, s. 1.)

Editor's Note. — The 1979 amendment inserted "or the defendant is appealing from a judgment of the district court to the superior court for a trial de novo," near the middle of subsection (c) and deleted "the" preceding "sentence is to begin" near the end of subsection (c).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 15A-1354. Concurrent and consecutive terms of imprisonment.

Amendment Effective July 1, 1980. — Session Laws 1979, c. 760, s. 4, will add at the end of subsection (a) a sentence reading as follows: "With respect to a person convicted of a felony that occurred on or after the effective date of Article 81A of this Chapter [July 1, 1980], G.S. 15A-1340.8 shall apply in addition to this subsection."

Session Laws 1979, c. 760, s. 6, provides: "This act shall become effective on July 1, 1980, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Cited in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

§ 15A-1355. Calculation of terms of imprisonment.

(b) Repealed by Session Laws 1977, 2nd Sess., c. 1147, s. 19, effective July 1, 1978.
(c) Credit for Good Behavior. — The Department of Correction may give credit toward service of the maximum term and any minimum term of imprisonment for allowances of time as provided in rules and regulations made

under G.S. 148-11 and 148-13. Provided, that one serving a period or periods of imprisonment as a condition of special probation shall serve his term of imprisonment day for day, without any credits toward service of his term by any provisions of any rules and regulations made by the Department of Correction. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 19; 1979, c. 749, s. 8.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, repealed subsection (b), relating to credit for time spent committed to or in confinement in correctional, mental or other institutions and for time spent in confinement in another jurisdiction.

The 1979 amendment added the second sentence of subsection (c).

As subsection (a) was not changed by the amendment, it is not set out.

Amendment Effective July 1, 1980. — Session Laws 1979, c. 760, s. 4, will rewrite subsection (c) of this section to read as follows:

"(c) Credit for Good Behavior. — The Department of Correction and jailers, as defined by G.S. 15A-1340.2, must give credit for good behavior toward service of a prison or jail term imposed for a felony that occurred on or after the effective date of Article 81A, as required by G.S. 15A-1340.7. The provisions of this section shall not apply to persons convicted of Class A or Class B felonies. The Department of Correction and jailers may give time credit toward service of other prison or jail terms imposed for a felony or misdemeanor, according to regulations issued by the Secretary of Correction as provided by G.S. 148-13."

Session Laws 1979, c. 760, s. 6, provides: "This act shall become effective on July 1, 1980, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Cited in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

ARTICLE 84.

Fines.

§ 15A-1361. Authorized fines.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

ARTICLE 85.

Parole.

§ 15A-1370.1. Applicability of Article 85. — This Article shall be applicable to all sentenced prisoners except convicted felons who are not committed youthful offenders and are not persons convicted of Class A or Class B felonies and are subject to Article 85A of this Chapter. (1979, c. 760, s. 4.)

Editor's Note. — Session Laws 1979, c. 760, s. 6, provides: "This act shall become effective on July 1, 1980, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 15A-1371. Parole eligibility, consideration, and refusal. — (a) Eligibility. — Unless his sentence includes a minimum sentence, a prisoner serving a term

other than one included in a sentence of special probation imposed under authority of this Subchapter is eligible for release on parole at any time. A prisoner whose sentence includes a minimum term of imprisonment imposed under authority of this Subchapter is eligible for release on parole only upon completion of the service of that minimum term or one fifth of the maximum penalty allowed by law for the offense for which the prisoner is sentenced, whichever is less, less any credit allowed under G.S. 15A-1355(c) and Article 19A of Chapter 15 of the General Statutes. Under this section, when the maximum allowed by law for the offense is life imprisonment, one fifth of the maximum is calculated as 20 years.

(b) Consideration for Parole. — The Parole Commission must consider the desirability of parole for each person sentenced for a maximum term of 18 months or longer:

(1) Within the period of 90 days prior to his eligibility for parole, if he is ineligible for parole until he has served more than a year; or

(2) Within the period of 90 days prior to the expiration of the first year of the sentence, if he is eligible for parole at any time. Whenever the Parole Commission will be considering for parole a prisoner who, if released, would have served less than half of the maximum term of his sentence, the Commission must notify the prisoner and the district attorney of the district where the prisoner was convicted at least 30 days in advance of considering the parole. If the district attorney makes a written request in such cases, the Commission must publicly conduct its consideration of parole. Following its consideration, the Commission must give the prisoner written notice of its decision. If parole is denied, the Commission must consider its decision while the prisoner is eligible for parole at least once a year until parole is granted and must give the prisoner written notice of its decision at least once a year.

(g) Notwithstanding the provisions of subsection (a), a prisoner serving a sentence of not less than 30 days nor as great as 18 months for a felony or a misdemeanor may be released on parole when he completes service of one-third of his maximum sentence unless the Parole Commission finds in writing that:

(1) There is a substantial risk that he will not conform to reasonable conditions of parole; or

(2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or

(3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or

(4) There is a substantial risk that he would engage in further criminal conduct.

If a prisoner is released on parole by operation of this subsection, the term of parole is the unserved portion of the sentence to imprisonment, and the conditions of parole, unless otherwise specified by the Parole Commission, are those authorized in G.S. 15A-1374(b)(4) through (10).

In order that the Parole Commission may have an adequate opportunity to make a determination whether parole under this section should be denied, no prisoner eligible for parole under this section shall be released from confinement prior to the fifth full working day after he shall have been placed in the custody of the Secretary of Correction or the custodian of a local confinement facility. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 19A-22; 1979, c. 749, ss. 9, 10.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, deleted "life imprisonment or" following "other than" in the first sentence of subsection (a), substituted "G.S. 15A-1355(c) and Article 19A of Chapter 15 of the General Statutes" for "G.S. 15A-1355(b) and (c)" at the end of the second sentence of subsection (a) and rewrote the former last sentence of subsection (a). In subsection (b), the amendment also

substituted "Within the period of 90 days" for "at least 60 days" at the beginning of subdivisions (1) and (2), inserted "the prisoner and" preceding "the district attorney" in the second sentence of subdivision (2), and substituted "give the prisoner written notice of its decision" for "issue a formal order granting or denying parole" at the end of the fourth sentence and near the end of the last sentence of subdivision (2). The amendment also inserted "maximum" near the beginning of the introductory language in subsection (g).

The 1979 amendment deleted the former last sentence of subsection (a), which provided for release on parole of a prisoner whose sentence included a minimum sentence identical to a minimum sentence required by law. The amendment also rewrote the introductory language in subsection (g) and added the last paragraph of subsection (g).

Session Laws 1977, c. 711, s. 38, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 31, effective July 1, 1978, provides: "The eligibility for parole and work release of prisoners sentenced before the effective date of this act is determined by the law applicable prior to the effective date of this act."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

As the rest of the section was not changed by the amendment, only subsections (a), (b) and (g) are set out.

For a survey of 1977 law on prisoners' rights, see 56 N.C.L. Rev. 1100 (1978).

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

Cited in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Wilkins, 297 N.C. 237, 254 S.E.2d 598 (1979).

§ 15A-1373. Incidents of parole.

(d) Effect of Violation. — If the parolee violates a condition at any time prior to the expiration or termination of the period, the Commission may continue him on the existing parole, with or without modifying the conditions, or, if continuation or modification is not appropriate, may revoke the parole as provided in G.S. 15A-1376 and reimprison the parolee for a term consistent with the following requirements:

(1) The recommitment must be for the unserved portion of the maximum term of imprisonment imposed by the court under G.S. 15A-1351.

(2) The prisoner must be given credit against the term of reimprisonment for all time spent in custody as a result of revocation proceedings under G.S. 15A-1376.

(1979, c. 927.)

Editor's Note. — The 1979 amendment deleted "or six months, whichever is greater" at the end of subdivision (1) of subsection (d).

As the rest of the section was not changed by the amendment, only subsection (d) is set out.

§ 15A-1374. Conditions of parole.

(b) Appropriate Conditions. — As conditions of parole, the Commission may require that the parolee comply with one or more of the following conditions:

(1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip him for suitable employment.

(2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on parole.

(4) Support his dependents and meet other family responsibilities.
(5) Refrain from possessing a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or the parole officer.
(6) Report to a parole officer at reasonable times and in a reasonable manner, as directed by the Commission or the parole officer.
(7) Permit the parole officer to visit him at reasonable times at his home or elsewhere.
(8) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the parole officer.
(9) Answer all reasonable inquiries by the parole officer and obtain prior approval from the parole officer for any change in address or employment.
(10) Promptly notify the parole officer of any change in address or employment.
(11) Submit at reasonable times to searches of his person by a parole officer for purposes reasonably related to his parole supervision. The Commission may not require as a condition of parole that the parolee submit to any other searches that would otherwise be unlawful.
(11a) Make restitution or reparation to an aggrieved party as provided in G.S. 148-57.1.
(12) Satisfy other conditions reasonably related to his rehabilitation. (1977, c. 711, s. 1; 1979, c. 749, s. 11.)

Editor's Note. — The 1979 amendment added subdivision (11a) to subsection (b).

As subsection (a) was not changed by the amendment, it is not set out.

Restitution as Condition of Parole. — The parole commission may, but is not required to, implement the recommendation of the sentencing court for restitution as a condition of parole. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

Reimbursement of State for Counsel Fees. — Under the provisions of this section the parole commission may, but is not required to, implement the recommendation of the sentencing court and impose as a condition of parole that the prisoner reimburse the State for counsel fees. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

§ 15A-1376. Arrest and hearing on parole violation. — (a) Arrest for Violation of Parole. — A parolee is subject to arrest by a law-enforcement officer or a parole officer for violation of conditions of parole only upon the issuance of an order of temporary or conditional revocation of parole by the Parole Commission. However, a parole revocation hearing under subsection (e) may be held without first arresting the parolee.

(b) When and Where Preliminary Hearing on Parole Violation Required. — Unless the hearing required by subsection (e) is first held or the parolee waives the hearing or a continuance is requested by the parolee, a preliminary hearing on parole violation must be held reasonably near the place of the alleged violation or arrest and within seven working days of the arrest of a parolee to determine whether there is probable cause to believe that he violated a condition of parole. Otherwise, the parolee must be released seven working days after his arrest to continue on parole pending a hearing. If the parolee is not within the State, his preliminary hearing is as prescribed by G.S. 148-65.1A.

(d) Procedure for Preliminary Hearing on Parole Violation. — The Department of Correction must give the parolee notice of the preliminary hearing and its purpose, including a statement of the violations alleged. At the hearing, the parolee may appear and speak in his own behalf, may present relevant information, and may, on request, personally question witnesses and adverse informants, unless the hearing officer finds good cause for not allowing

confrontation. If the person holding the hearing determines there is probable cause to believe the parolee violated his parole, he must summarize the reasons for his determination and the evidence he relied on. Formal rules of evidence do not apply at the hearing. If probable cause is found, the parolee may be held in the custody of the Department of Correction to serve the appropriate term of imprisonment, subject to the outcome of a revocation hearing under subsection (e).

(e) Revocation Hearing. — Before finally revoking parole, the Parole Commission must, unless the parolee waived the hearing or the time limit, provide a hearing within 45 days of the parolee's reconfinement to determine whether to revoke parole finally. The Parole Commission must adopt regulations governing the hearing and must file and publish them as provided in Article 5 of Chapter 150A of the General Statutes. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 23-26.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, inserted "by a law-enforcement officer or a parole officer" in the first sentence of subsection (a), inserted "or a continuance is requested by the parolee" near the beginning of the first sentence of subsection (b), substituted "seven" for "four" near the middle of the first sentence and in the second sentence and added the last sentence of subsection (b), substituted "hearing officer" for "court" near the end of the second sentence in subsection (d), and substituted the present second sentence of subsection (e) for provisions to the effect that the hearing should be governed by Article 3 of Chapter 150A, with certain exceptions.

As subsection (c) was not changed by the amendment, it is not set out.

§ 15A-1377: Repealed by Session Laws 1977, 2nd Sess., c. 1147, s. 27, effective July 1, 1978.

ARTICLE 85A.

Parole of Convicted Felons.

§ 15A-1380.1. Eligibility of felons for parole. — A prisoner who is not a committed youthful offender and has been convicted of a felony other than a Class A or a Class B felony and is serving a prison or jail term imposed for a felony that occurred on or after July 1, 1980 is not eligible for parole except as provided by this Article. For the purposes of this Article, a life sentence shall be equivalent to 80 years. (1979, c. 760, s. 4.)

Editor's Note. — Session Laws 1979, c. 760, s. 6, provides: "This act shall become effective on July 1, 1980, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 15A-1380.2. Re-entry parole of felons. — (a) The Parole Commission shall parole each prisoner serving a prison or jail term of 18 months or more for a felony 90 days before the expiration of his term, less credit for time already served as provided by Article 19A of Chapter 15 of the General Statutes, credit for good behavior as required by G.S. 15A-1340.7, and additional gain time credit that he may receive pursuant to the regulations of the Secretary of Correction issued under G.S. 148-13. The provisions of this section shall not apply to persons convicted of Class A or Class B felonies.

(b) The purpose of the parole established by this section is to facilitate the re-entry of the felony prisoner into the free community. The Department of Correction shall provide such services as may be helpful for this purpose.

(c) The term of parole for a prisoner paroled under this section shall be 90 days.

(d) The provisions of G.S. 15A-1373, 15A-1375, and 15A-1376 regarding incidents of parole, commencement of parole, and arrest and hearing on parole violation, shall be applicable to re-entry parole of felons, except that G.S. 15A-1373(d) regarding the effect of violation shall not apply. The only conditions of re-entry parole shall be those provided by G.S. 15A-1374(b)(6), (7), (8), (9), and (10).

(e) If the parolee remains in compliance with conditions of parole during the 90 days of his re-entry parole, he shall be unconditionally discharged from prison or jail at the end of the 90 days.

(f) If the parolee violates parole conditions before the end of his 90-day parole term, the Parole Commission may revoke his re-entry parole. If re-entry parole is revoked, the prisoner shall be returned to prison or jail where he shall serve 90 days, but shall continue to receive credit for good behavior required by G.S. 15A-1340.7(b), and any additional gain time credit to which he may be entitled pursuant to the regulations of the Secretary of Correction under G.S. 148-13, and shall be unconditionally discharged at the end of 90 days less any such credit received.

(g) Each prisoner eligible for re-entry parole may refuse to accept such parole, in which case he shall remain in prison, but shall not lose accrued credit pursuant to G.S. 15A-1340.7 or 148-13, and shall continue to receive credit to which he may be entitled under those statutes. (1979, c. 760, s. 4.)

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

ARTICLE 88.

Post-Trial Motions and Appeal.

§ 15A-1401. Post-trial motions and appeal.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Post-Trial Motions and Appeals," see 14 Wake Forest L. Rev. 997 (1978).

ARTICLE 89.

Motion for Appropriate Relief and Other Post-Trial Relief.

§ 15A-1411. Motion for appropriate relief.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Post-Trial Motions and Appeals," see 14 Wake Forest L. Rev. 997 (1978).

Exhaustion of Remedies Provided by State. — North Carolina's institution of a new system of post-conviction review reaffirms its desire to review and correct possible criminal trial errors. The federal court welcomes such a manifest spirit and will require all state habeas corpus petitioners to avail themselves of §§ 15A-1411 to 1422, or demonstrate that they would not be allowed to pursue their claims in these proceedings, before deeming the exhaustion requirement met. Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978).

Applied in State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979).

§ 15A-1413. Trial judges empowered to act.

Applied in State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979).

§ 15A-1414. Motion by defendant for appropriate relief made within 10 days after verdict.

Amendment Effective July 1, 1980. — Session Laws 1979, c. 760, s. 3, will amend subsection (b) of this section by adding a new subdivision (4), reading as follows:

"(4) The sentence imposed on the defendant is not supported by evidence introduced at the trial and sentencing hearing."

Session Laws 1979, c. 760, s. 6, provides: "This act shall become effective on July 1, 1980, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Cited in State v. Johnson, 34 N.C. App. 328, 238 S.E.2d 313 (1977); Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978).

§ 15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict and without limitation as to time.

Exhaustion of Remedies Provided by State. — Claims asserted in federal court under 28 U.S.C. § 2254 alleging that the state prisoner was denied the effective assistance of counsel, denied defense witnesses, not advised of the proper procedure for filing an appeal or the applicable time limitations and denied the right to appeal, were cognizable under this section and were required to be presented to a state court in order to meet federal exhaustion requirements. Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978).

Establishing Cause for Failing to Raise Claims on Appeal. — Claims asserted in federal court under 28 U.S.C. § 2254 alleging that the state prisoner was convicted on perjured evidence through the state's witnesses, was not given his right to allocution, and was not given a presentence hearing were cognizable under this section if the petitioner could establish good cause for failing to have raised them on appeal, and were required to be presented to a state court in order to meet federal exhaustion requirements. Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978).

Not only are collateral attacks proper under this section but there now exists the possibility that an unappealed error can be reviewed by the state courts when good cause is shown. Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978).

Newly Discovered Evidence. —

In accord with 3rd paragraph in original. State v. Martin, 40 N.C. App. 408, 252 S.E.2d 859 (1979).

Where the defendant in a prosecution for arson had filed a request for voluntary discovery of the report of any laboratory test, the prosecutor had agreed to comply and had, in part, complied, but apparently through oversight the prosecutor failed to make a report available when it came into his possession, the defendant was not lacking in due diligence within the meaning of subdivision (b)(6) of this section in failing to make a motion to compel discovery. There was nothing to put the defendant on notice that the prosecutor had failed or refused to comply with his request. State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978).

A motion for a new trial on the ground of newly discovered evidence is addressed to the

discretion of the trial court, and its order denying the motion will not be disturbed unless abuse of discretion appears. State v. Martin, 40 N.C. App. 408, 252 S.E.2d 859 (1979).

Collateral Attack on Guilty Plea. — An adjudication by a trial judge that a plea of guilty was voluntarily made did not bar a criminal defendant from collaterally attacking that plea in a post-conviction hearing. Edmondson v. State, 33 N.C. App. 746, 236 S.E.2d 397 (1977), decided under former Article 22 of Chapter 15.

Applied in State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979).

§ 15A-1417. Relief available.

Applied in State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978).

§ 15A-1418. Motion for appropriate relief in the appellate division.

Applied in State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978).

Cited in Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978).

§ 15A-1419. When motion for appropriate relief denied.

An ineffective assistance of counsel claim, coupled with an alleged failure to adequately inform petitioner of his appeal right, may show "good cause" within the meaning of subsection (b) of this section. Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978).

Cited in Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978); Ellis v. Reed, 596 F.2d 1195 (4th Cir. 1979).

§ 15A-1420. Motion for appropriate relief; procedure.

Cited in State v. Roberts, 41 N.C. App. 187, 254 S.E.2d 216 (1979).

§ 15A-1422. Review upon appeal.

Defendant's appeal from an order denying his petition for writ of error coram nobis treated as petition for writ of certiorari. See State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979).

Applied in State v. Roberts, 41 N.C. App. 187, 254 S.E.2d 216 (1979).

ARTICLE 90.

Appeals from Magistrates and District Court Judges.

§ 15A-1431. Appeals by defendant from magistrate and district court judge; trial de novo.

(f) Appeal pursuant to this section stays the execution of portions of the judgment relating to fine and costs. Appeal stays portions of the judgment relating to confinement when the defendant has complied with conditions of pretrial release. If the defendant cannot comply with conditions of pretrial release, the judge may order confinement in a local confinement facility pending the trial de novo in superior court.

(1979, c. 758, s. 2.)

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

The 1979 amendment added the third sentence of subsection (f).

As the rest of the section was not changed by the amendment, only subsection (f) is set out.

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Post-Trial Motions and Appeals," see 14 Wake Forest L. Rev. 997 (1978).

§ 15A-1432. Appeals by State from district court judge.

Cited in State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978); State v. Stewart, 40 N.C. App. 693, 253 S.E.2d 638 (1979).

ARTICLE 91.

Appeal to Appellate Division.

§ 15A-1441. Correction of errors by appellate division.

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Post-Trial Motions and Appeals," see 14 Wake Forest L. Rev. 997 (1978).

§ 15A-1442. Grounds for correction of error by appellate division.

Amendment Effective July 1, 1980. — Session Laws 1979, c. 760, s. 3, effective July 1, 1980, will add to this section a new subdivision (5a), reading as follows:

"(5a) Insufficient Basis for Sentence. — The sentence imposed on the defendant is not supported by evidence introduced at the trial and sentencing hearing."

Session Laws 1979, c. 760, s. 6, provides: "This act shall become effective on July 1, 1980, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 15A-1443. Existence and showing of prejudice.

Applied in State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978); State v. Correll, 38 N.C. App. 451, 248 S.E.2d 451 (1978); State v. McQueen, 39 N.C. App. 64, 249 S.E.2d 464 (1978); State v. Johnston, 39 N.C. App. 179, 249 S.E.2d 879 (1978); State v. Sledge, 297 N.C. 227, 254 S.E.2d 579 (1979).

Quoted in State v. Vert, 39 N.C. App. 26, 249 S.E.2d 476 (1978).

Cited in State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

§ 15A-1444. When defendant may appeal; certiorari.

Amendment Effective July 1, 1980. — Session Laws 1979, c. 760, s. 3, effective July 1, 1980, will add to this section a new subsection (a1), reading as follows:

"(a1) A defendant who has entered a plea of not guilty to a felony and who has been found guilty of a felony is entitled to appeal as a matter of right the issue of whether his sentence is supported by evidence introduced at the trial and sentencing hearing only if the prison term of the sentence exceeds the presumptive term set by G.S. 15A-1340.4; otherwise, he is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari."

Session Laws 1979, c. 760, s. 6, provides: "This act shall become effective on July 1, 1980, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Application of Former Statute to Certiorari to Review Judgment in Habeas Corpus. — By analogy, § 7A-27(a), former § 15-180.2 and App. R. 21(b) were logically applicable to petitions for certiorari to review judgments in habeas corpus proceedings involving the restraint of prisoners under sentences of death or life imprisonment. State v. Niccum, 293 N.C. 276, 238 S.E.2d 141 (1977).

Applied in State v. Ervin, 38 N.C. App. 261, 248 S.E.2d 91 (1978).

§ 15A-1445. Appeal by the State.

Quoted in State v. Hamilton, 36 N.C. App. 538, 245 S.E.2d 91 (1978).

Cited in State v. Collins, 38 N.C. App. 617, 248 S.E.2d 405 (1978); State v. Charlotte Liberty Mut. Ins. Co., 39 N.C. App. 557, 251 S.E.2d 867 (1979); State v. Stewart, 40 N.C. App. 693, 253 S.E.2d 638 (1979).

§ 15A-1446. Requisites for preserving the right to appellate review.

(d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.

(1) Lack of jurisdiction of the trial court over the offense of which the defendant was convicted.
(2) Lack of jurisdiction of the trial court over the person of the defendant.
(3) The criminal pleading charged acts which, at the time they were committed, did not constitute a violation of criminal law.
(4) The pleading fails to state essential elements of an alleged violation, as required by G.S. 15A-924(a)(5).
(5) The evidence was insufficient as a matter of law.
(6) The defendant was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina.
(7) Repealed by Session Laws 1977, 2nd Sess., c. 1147, s. 28.
(8) The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.
(9) Subsequent admission of evidence from a witness when there has been an improperly overruled objection to the admission of evidence on the ground that the witness is for a specified reason incompetent or not qualified or disqualified.
(10) Subsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning.

(11) Questions propounded to a witness by the court or a juror.
(12) Rulings and orders of the court, not directed to the admissibility of evidence during trial, when there has been no opportunity to make an objection or motion.
(13) Error of law in the charge to the jury.
(14) The court has expressed to the jury an opinion as to whether a fact is fully or sufficiently proved.
(15) The defendant was not present at any proceeding at which his presence was required.
(16) Error occurred in the entry of the plea.
(17) The form of the verdict was erroneous.
(18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.
(19) A significant change in law, either substantive or procedural, applies to the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required.
(1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 28.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, repealed subdivision (7) of subsection (d), which read: "The conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina."

As the rest of the section was not changed by the amendment, only subsection (d) is set out.

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

Applied in State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979); State v. Wilkins, 297 N.C. 237, 254 S.E.2d 598 (1979); State v. Rhyne, 39 N.C. App. 319, 250 S.E.2d 102 (1979).

Cited in State v. Wilkins, 297 N.C. 237, 254 S.E.2d 598 (1979).

§ 15A-1448. Procedures for taking appeal. — (a) Time for Entry of Appeal; Jurisdiction over the Case. —
(1) A case remains open for the taking of an appeal to the appellate division for a period of 10 days after the entry of judgment.
(2) When a motion for appropriate relief is made during the 10-day period, the case remains open for the taking of an appeal until the expiration of 10 days after the court has ruled on the motion.
(3) The jurisdiction of the trial court with regard to the case is divested, except as to actions authorized by G.S. 15A-1453, when notice of appeal has been given and the period described in (1) and (2) has expired.
(4) If there has been no ruling by the trial judge on a motion for appropriate relief within 10 days after motion for such relief has been made, the motion shall be deemed denied.
(5) The right to appeal is not waived by withdrawal of an appeal if the appeal is reentered within the time specified in (1) and (2).
(6) The right to appeal is not waived by compliance with all or a portion of the judgment imposed. If the defendant appeals, the court may enter appropriate orders remitting any fines or costs which have been paid. The court may delay the remission pending the determination of the appeal.
(1977, 2nd Sess., c. 1147, s. 29.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, rewrote subdivisions (3) and (4) of subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Applied in State v. Ervin, 38 N.C. App. 261, 248 S.E.2d 91 (1978).

Cited in State v. Morris, 41 N.C. App. 164, 254 S.E.2d 241 (1979).

SUBCHAPTER XV. CAPITAL PUNISHMENT.

ARTICLE 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(e) Aggravating Circumstances. — Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.
(2) The defendant had been previously convicted of another capital felony.
(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.
(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
(6) The capital felony was committed for pecuniary gain.
(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties because of the exercise of his official duty.
(9) The capital felony was especially heinous, atrocious, or cruel.
(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.
(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(1979, c. 565, s. 1; c. 682, s. 9.)

Editor's Note. —

The first 1979 amendment added subdivision (11) to subsection (e).

The second 1979 amendment, effective January 1, 1980, inserted "or a sex offense" near the middle of subdivision (5) of subsection (e).

Session Laws 1979, c. 565, s. 2, provides: "This act is effective upon ratification and shall apply to all offenses committed after the date of its ratification." The act was ratified May 14, 1979.

Session Laws 1979, c. 682, ss. 13 and 14, provides:

"Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1980] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws 1979, c. 682, s. 12, contains a severability clause.

As the rest of the section was not changed by the amendment, only subsection (e) is set out.

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

District Attorney's Reading of Subsection (d) to Jury Was Error. — During the sentencing phase of a bifurcated prosecution for murder, it was error for the district attorney to read to the jury § 15A-2000(d), relating to the review of judgment and sentence by the Supreme Court. A reference to appellate review has no relevance with regard to the jury's task of weighing any aggravating and mitigating circumstances for the purpose of recommending a sentence. More importantly such reference will, in all likelihood, result in the jury's reliance on the Supreme Court for the ultimate determination of sentence. State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

The rule precluding any argument which suggests to the jurors that they can depend on judicial or executive review to correct an erroneous verdict and thereby lessen the jurors' responsibility applies with equal force to a sentence recommendation in a bifurcated trial. State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

District Attorney's Reference to Parole Statute Was Error. — In a prosecution for murder, during the sentencing phase of a bifurcated trial, the district attorney's reference to the parole statute was erroneous. Neither the State nor the defendant should be allowed to speculate upon the outcome of possible appeals, paroles, executive commutations or pardons. The jury's sentence recommendation should be based solely on their balancing of the aggravating and mitigating factors before them. State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

In the sentencing phase of a bifurcated trial, a reference to any statutory provision, which would have the effect of minimizing in the jurors' minds their role in recommending the sentence to be imposed, is precluded. The matters which a jury may consider in the sentencing phase of a bifurcated trial are clearly set forth in § 15A-2000(e) and (f). State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

Stated in State v. Niccum, 293 N.C. 276, 238 S.E.2d 141 (1977).

Cited in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Carter, 296 N.C. 344, 250 S.E.2d 263 (1979).

Chapter 16.

Gaming Contracts and Futures.

ARTICLE 2.

Contracts for "Futures."

§ 16-3. Certain contracts as to "futures" void.

Cited in Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 561 (1978).

Chapter 17.

Habeas Corpus.

ARTICLE 6.

Proceedings and Judgment.

§ 17-32. Proceedings on return; facts examined; summary hearing of issues.

Cited in State v. Niccum, 293 N.C. 276, 238 S.E.2d 141 (1977).

Chapter 17A.

Law-Enforcement Officers.

§§ 17A-1 to 17A-9: Recodified as §§ 17C-1 to 17C-12, effective January 1, 1980.

Editor's Note. — This Chapter was rewritten by Session Laws 1979, c. 763, s. 1, effective January 1, 1980, and has been recodified as Chapter 17C.

Chapter 17B.

North Carolina Criminal Justice Education and Training System.

§§ 17B-1 to 17B-6: Recodified as §§ 17D-1 to 17D-4, effective January 1, 1980.

Editor's Note. — This Chapter was rewritten by Session Laws 1979, c. 763, s. 2, effective January 1, 1980, and has been recodified as Chapter 17D.

Chapter 17C.

North Carolina Criminal Justice Education and Training Standards Commission.

§ 17C-1. Findings and policy. — The General Assembly finds that the administration of criminal justice is of statewide concern, and that proper administration is important to the health, safety and welfare of the people of the State and is of such nature as to require education and training of a professional nature. It is in the public interest that such education and training be made available to persons who seek to become criminal justice officers, persons who are serving as such officers in a temporary or probationary capacity, and persons already in regular service. (1971, c. 963, s. 1; 1979, c. 763, s. 1.)

Editor's Note. — This Chapter is Chapter 17A as rewritten by Session Laws 1979, c. 763, s. 1, effective January 1, 1979, and recodified. Where appropriate, the historical citations to the sections in the former Chapter have been added to corresponding sections in the Chapter as rewritten and recodified.

§ 17C-2. Definitions. — Unless the context clearly otherwise requires, the following definitions apply in this Chapter:

(a) "Commission" means the North Carolina Criminal Justice Education and Training Standards Commission;

(b) "Criminal justice agencies" means the State and local law enforcement agencies, the State correctional agencies, the jails and other correctional agencies maintained by local governments, and the juvenile justice agencies;

(c) "Criminal justice officer(s)" means and incorporates the administrative and subordinate personnel of all of the departments, agencies, units or entities comprising the "criminal justice agencies," as defined in subsection (a), who are sworn law enforcement officers, both State and local, with the power of arrest; State correctional officers; State probation and parole officers; or youth correctional officers. However, those individuals who are elected or appointed to criminal justice offices created under the Constitution of North Carolina are expressly exempted from the application of any minimum qualification standards or position certification requirements developed under the provision of this Chapter. This exemption shall not apply to relevant subordinate personnel of these constituted officials.

(d) "Entry level" means the initial appointment or employment of any person by a criminal justice agency, or any appointment or employment of a person previously employed by a criminal justice agency who has not been employed by a criminal justice agency for the 12-month period preceding this appointment or employment, or any appointment or employment of a previously certified criminal justice officer to a position which requires a different type of certification. (1971, c. 963, s. 2; 1979, c. 763, s. 1.)

§ 17C-3. North Carolina Criminal Justice Education and Training Standards Commission established; members; terms; vacancies. — (a) There is hereby established the North Carolina Criminal Justice Education and Training Standards Commission, hereinafter called "the Commission," in the Department of Justice. The Commission shall be composed of 26 members as follows:

(1) Sheriffs. — Three sheriffs or other individuals serving in sheriffs' departments selected by the North Carolina Sheriffs' Association and one deputy sheriff selected by the North Carolina Law-Enforcement Officers' Association.

(2) Police Officers. — One police official selected by the North Carolina Association of Police Executives, one police chief selected by the North Carolina Association of Chiefs of Police, one police chief appointed by the Governor, and one police officer selected by the North Carolina Law-Enforcement Officers' Association.

(3) Departments. — The Attorney General of the State of North Carolina; the Secretary of the Department of Crime Control and Public Safety; the Secretary of the Department of Human Resources; and the Secretary of the Department of Correction.

(4) At-Large Groups. — One individual representing and appointed by each of the following organizations: one mayor selected by the League of Municipalities; one county commissioner selected by the North Carolina Association of County Commissioners; one law enforcement training officer selected by the North Carolina Law-Enforcement Training Officers' Association; one criminal justice educator selected by the North Carolina Association of Criminal Justice Educators; one sworn law enforcement officer selected by the North Carolina State Law-Enforcement Officers' Association; and one district attorney selected by the North Carolina Association of District Attorneys.

(5) Citizens and Others. — One trial court judge selected by the Chief Justice of the North Carolina Supreme Court; one senator selected by the Lieutenant Governor; one member of the House of Representatives selected by the Speaker of the House; the President of The University of North Carolina; the Director of the Institute of Government; the Director of Law-Enforcement Training of the Department of Community Colleges; and two citizens, one of whom shall be selected by the Governor and one of whom shall be selected by the Attorney General.

(b) The members shall be appointed for staggered terms. The initial appointments shall be made prior to January 1, 1980, and the appointees shall hold office until July 1 of the year in which their respective terms expire and until their successors are appointed and qualified as provided hereafter:

For the terms of one year: one member from subdivision (1) of subsection (a), serving as a deputy sheriff; one member from subdivision (2) of subsection (a), serving as a police officer; one member from subdivision (4), appointed by the North Carolina Law-Enforcement Training Officers' Association; and two members from subdivision (5), one appointed by the Governor and one appointed by the Attorney General.

For the terms of two years: two members from subdivision (1) of subsection (a); one member from subdivision (2) of subsection (a), appointed by the North Carolina Association of Chiefs of Police; two members from subdivision (4), one appointed by the North Carolina League of Municipalities and one appointed by the North Carolina Association of District Attorneys; and one member from subdivision (5), appointed by the Chief Justice.

For the terms of three years: two members from subdivision (1) of subsection (a), two members from subdivision (2) of subsection (a); three members from subdivision (4), and two members from subsection division (5).

Thereafter, as the term of each member expires, his successor shall be appointed for a term of three years. Notwithstanding the appointments for a term of years, each member shall serve at the will of the appointing authority.

The Attorney General, the Secretary of the Department of Crime Control and Public Safety, the Secretary of the Department of Human Resources, the Secretary of the Department of Correction, the President of The University of North Carolina, the Director of the Institute of Government, and the Director of Law-Enforcement Training of the Department of Community Colleges shall be continuing members of the Commission during their tenure. These members of the Commission shall serve ex officio and shall perform their duties on the Commission in addition to the other duties of their offices. The ex officio members may elect to serve personally at any or all meetings of the Commission or may designate, in writing, one member of their respective office, department, university or agency to represent and vote for them on the Commission at all meetings the ex officio members are unable to attend.

Vacancies in the Commission occurring for any reason shall be filled, for the unexpired term, by the authority making the original appointment of the person causing the vacancy. (1971, c. 963, s. 3; 1977, c. 70, ss. 29, 30; 1979, c. 763, s. 1.)

§ 17C-4. Compensation. — Members of the Commission who are State officers or employees shall receive no compensation for serving on the Commission, but may be reimbursed for their expenses in accordance with G.S. 138-6. Members of the Commission who are full-time salaried public officers or employees other than State officers or employees shall receive no compensation for serving on the Commission, but may be reimbursed for their expenses in accordance with G.S. 138-5(b). All other members of the Commission may receive compensation and reimbursement for expenses in accordance with G.S. 138-5. (1971, c. 963, s. 4; 1979, c. 763, s. 1.)

§ 17C-5. Chairman; vice-chairman; other officers; meetings; reports. — (a) The Attorney General shall designate one of the members of the Commission as chairman upon its creation, and shall appoint or reappoint a chairman each July 1 thereafter. The ex officio members shall not be eligible for this appointment.

(b) The Commission shall select a vice-chairman and such other officers and committee chairmen from among its members as it deems desirable at the first regular meeting of the Commission after its creation and at the first regular meeting after July 1 of each year thereafter. Nothing in this subsection, however, shall prevent the creation or abolition of committees or offices of the Commission, other than the office of vice-chairman, as the need may arise at any time during the year.

(c) The Commission shall hold at least four regular meetings per year upon the call of the chairman. Special meetings shall be held upon the call of the chairman or the vice-chairman, or upon the written request of five members of the Commission. Such special meetings must be held within 30 days.

(d) The Commission shall present regular and special reports and recommendations to the Attorney General or the General Assembly, or both, as the need may arise or as the Attorney General or General Assembly may request. (1971, c. 963, s. 5; 1979, c. 763, s. 1.)

§ 17C-6. Powers of Commission. — (a) In addition to powers conferred upon the Commission elsewhere in this Chapter, the Commission shall have the following powers, which shall be enforceable through its rules and regulations, certification procedures, or the provisions of G.S. 17A-10:

(1) Promulgate rules and regulations for the administration of this Chapter, which rules may require (i) the submission by any criminal justice agency of information with respect to the employment, education, and

training of its criminal justice officers, and (ii) the submission by any criminal justice training school of information with respect to its criminal justice training programs that are required by this Chapter;

(2) Establish minimum educational and training standards that must be met in order to qualify for entry level employment as a criminal justice officer in temporary or probationary status or in a permanent position;

(3) Certify, pursuant to the standards that it has established for the purpose, persons as qualified under the provisions of this Chapter to be employed at entry level as criminal justice officers;

(4) Establish minimum standards for the certification of criminal justice training schools and programs or courses of instruction that are required by this Chapter;

(5) Certify, pursuant to the standards that it has established for the purpose, criminal justice training schools and programs or courses of instruction that are required by this Chapter;

(6) Establish minimum standards and levels of education or equivalent experience for all criminal justice teachers who participate in programs or courses of instruction that are required by this Chapter;

(7) Certify, pursuant to the standards that it has established for the purpose, criminal justice teachers who participate in programs or courses of instruction that are required by this Chapter;

(8) Make such evaluations as may be necessary to determine if criminal justice agencies are complying with the provision of this Chapter;

(9) Adopt and amend bylaws, consistent with law, for its internal management and control;

(10) Enter into contracts incident to the administration of its authority pursuant to this Chapter.

(b) The Commission shall have the following powers, which shall be advisory in nature and for which the Commission is not authorized to undertake any enforcement actions:

(1) Identify types of criminal justice positions for which advanced or specialized training and education are appropriate, and establish minimum standards for the certification of persons as being qualified for those positions on the basis of specified education, training, and experience; provided, that compliance with these minimum standards shall be discretionary on the part of criminal justice agencies with respect to their criminal justice officers;

(2) Certify, pursuant to the standards that it has established for the purpose, criminal justice officers for those criminal justice agencies that elect to comply with the minimum education, training, and experience standards established by the Commission for positions for which advanced or specialized training, education, and experience are appropriate;

(3) Consult and cooperate with counties, municipalities, agencies of this State, other governmental agencies, and with universities, colleges, junior colleges, and other institutions concerning the development of criminal justice training schools and programs or courses of instruction;

(4) Study and make reports and recommendations concerning criminal justice education and training in North Carolina;

(5) Conduct and stimulate research by public and private agencies which shall be designed to improve education and training in the administration of criminal justice;

(6) Study, obtain data, statistics, and information and make reports concerning the recruitment, selection, education and training of persons serving criminal justice agencies in this State; to make recommendations for improvement in methods of recruitment, selection, education and training of persons serving criminal justice agencies;

(7) Make recommendations concerning any matters within its purview pursuant to this Chapter;
(8) Appoint such advisory committees as it may deem necessary;
(9) Do such things as may be necessary and incidental to the administration of its authority pursuant to this Chapter;
(10) Formulate basic plans for and promote the development and improvement of a comprehensive system of education and training for the officers and employees of criminal justice agencies consistent with its rules and regulations;
(11) Maintain liaison among local, State and federal agencies with respect to criminal justice education and training;
(12) Promote the planning and development of a systematic career development program for criminal justice professionals.

(c) All decisions and rules and regulations heretofore made by the North Carolina Criminal Justice Training and Standards Council and the North Carolina Criminal Justice Education and Training System Council shall remain in full force and effect unless and until repealed or suspended by action of the North Carolina Criminal Justice Education and Training Standards Commission established herein. The present Councils are terminated on December 31, 1979, and their power, duties and responsibilities vest in the North Carolina Criminal Justice Education and Training Standards Commission effective January 1, 1980. (1971, c. 963, s. 6; 1975, c. 372, s. 2; 1979, c. 763, s. 1.)

§ 17C-7. Functions of the Department of Justice. — (a) The Attorney General shall provide such staff assistance as the Commission shall require in the performance of its duties.

(b) The Attorney General shall have legal custody of all books, papers, documents, or other records and property of the Commission. (1979, c. 763, s. 1.)

§ 17C-8. System established. — The North Carolina Criminal Justice Education and Training Standards Commission shall establish a North Carolina Criminal Justice Education and Training System. The system shall be a cooperative arrangement among criminal justice agencies, both State and local, and criminal justice education and training schools, both public and private, to provide education and training to the officers and employees of the criminal justice agencies of the State of North Carolina and its local governments. Members of the system shall include the North Carolina Justice Academy as well as such other public or private agencies or institutions within the State, that are engaged in criminal justice education and training, and desire to be affiliated with the system for the purpose of achieving greater coordination of criminal justice education and training efforts in North Carolina. (1979, c. 763, s. 1.)

§ 17C-9. Criminal Justice Standards Division of the Department of Justice established; appointment of director; duties. — (a) There is hereby established, within the Department of Justice, the Criminal Justice Standards Division, hereinafter called "the Division," which shall be organized and staffed in accordance with applicable laws and regulations and within the limits of authorized appropriations.

(b) The Attorney General shall appoint a director for the Division who shall be responsible to and serve at the pleasure of the Attorney General.

(c) The Division shall administer such programs as are assigned to it by the Commission. The Division shall also administer such additional related programs as may be assigned to it by the Attorney General or the General Assembly. Administrative duties and responsibilities shall include, but are not limited to, the following:

(1) Administering any and all programs assigned to the Division by the Commission and reporting any violations of or deviations from the rules and regulations of the Commission as the Commission may require;
(2) Compiling data, developing reports, identifying needs and performing research relevant to beneficial improvement of the criminal justice agencies;
(3) Developing new and revising existing programs for adoption consideration by the Commission;
(4) Monitoring and evaluating programs of the Commission;
(5) Providing technical assistance to relevant agencies of the criminal justice system to aid them in the discharge of program participation and responsibilities;
(6) Disseminating information on Commission programs to concerned agencies and/or individuals;
(7) Taking such other actions as may be deemed necessary or appropriate to carry out its assigned duties and responsibilities;
(8) The director may divulge any information in the Division's personnel file of a criminal justice officer or applicant for certification to the head of the criminal justice agency employing the officer or considering the applicant for employment when the director deems it necessary and essential to the retention or employment of said officer or applicant. The information may be divulged whether or not such information was contained in a personnel file maintained by a State or by a local government agency. (1979, c. 763, s. 1.)

§ 17C-10. Required standards. — (a) Criminal justice officers shall not be required to meet any requirement of subsections (b) and (c) of this section as a condition of continued employment, nor shall failure of any such criminal justice officer to fulfill such requirements make him ineligible for any promotional examination for which he is otherwise eligible if the criminal justice officer held a permanent appointment prior to March 15, 1973, and is a sworn law enforcement officer with power of arrest; prior to January 1, 1974, and is a State adult correctional officer; prior to July 1, 1975, and is a State probation and parole officer; or prior to July 1, 1974, and is a youth correctional officer. The legislature finds, and it is hereby declared to be the policy of this Chapter, that such criminal justice officers have satisfied such requirements by their experience. It is the intent of the Chapter that all criminal justice officers employed at the entry level after the Commission has adopted the required standards shall meet the requirements of this Chapter. If any criminal justice officer exempted from the required standards by this provision fails to serve as a criminal justice officer for a 12-month period, said officer shall be required to comply with the required standards established by the Commission pursuant to the authority otherwise granted in this section.

(b) The Commission shall provide, by regulation, that no person shall be appointed as a criminal justice officer at entry level, except on a temporary or probationary basis, unless such person has satisfactorily completed an initial preparatory program of training at a school certified by the Commission. Upon separation of a criminal justice officer from a criminal justice agency within the year of temporary or probationary appointment, the probationary certification shall be terminated by the Commission. Upon the reappointment to the same agency or appointment to another criminal justice agency of an officer who has separated from an agency within the year of probation, the officer shall be charged with the amount of time served during his initial appointment and allowed the remainder of the one year probationary period to complete the basic training requirement. Upon the reappointment to the same agency or appointment to another agency of an officer who has separated from an agency

within the year of probation and who has remained out of service for more than one year from the date of separation, the officer shall be allowed another one-year period to satisfy the basic training requirement. Any criminal justice officer appointed on a temporary or probationary basis who does not comply with the training provisions of this Chapter within one year shall not be authorized to exercise the powers of a criminal justice officer and shall not be authorized to exercise the power of arrest.

(c) In addition to the requirements of subsection (b) of this section, the Commission, by rules and regulations, shall fix other qualifications for the employment and retention of criminal justice officers including minimum age, education, physical and mental standards, citizenship, good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the responsibilities of criminal justice offices,and the Commission shall prescribe the means for presenting evidence of fulfillment of these requirements.

Where minimum educational standards are not met, yet the individual shows potential and a willingness to achieve the standards by extra study, they may be waived by the Commission for the reasonable amount of time it will take to achieve the standards required.

(d) The Commission may issue a certificate evidencing satisfaction of the requirements of subsections (b) and (c) of this section to any applicant who presents such evidence as may be required by its rules and regulations of satisfactory completion of a program or course of instruction in another jurisdiction equivalent in content and quality to that required by the Commission for approved criminal justice education and training programs in this State. (1971, c. 963, s. 1; 1979, c. 763, s. 1.)

§ 17C-11. Injunctions authorized. — The Commission is hereby authorized to bring a civil action in the county of the residence of the alleged violation against any criminal justice agency which numbers among its employed or appointed criminal justice officers any criminal justice officer who fails to meet the required standards established by the Commission pursuant to G.S. 17C-10 of this Chapter to enjoin such criminal justice agency from allowing such criminal justice officer to perform any and all criminal justice officer functions, including exercising the power of arrest, until such time as such criminal justice officer shall comply with the required standards established by the Commission pursuant to G.S. 17C-10 of this Chapter. (1979, c. 763, s. 1.)

§ 17C-12. Grants under the supervision of Commission and the State; donations and appropriations. — (a) The Commission may accept for any of its purposes and functions under this Chapter any and all donations, both real and personal, and grants of money from any governmental unit or public agency, or from any institution, person, firm or corporation, and may receive, utilize and dispose of the same. Any arrangements pursuant to this section shall be detailed in an annual report of the Commission. Such report shall include the identity of the donor, the nature of the transaction, and the conditions, if any. Any money received by the Commission pursuant to this section shall be deposited in the State Treasury to the account of the Commission.

(b) The Commission may authorize the reimbursement to each political subdivision of the State not exceeding sixty percent (60%) of the salary and of the allowable tuition, living and travel expenses incurred by the officers in attendance at approved training programs, providing said political subdivisions do in fact adhere to the selection and training standards established by the Commission.

(c) The Commission by rules and regulations, shall provide for administration of the grant program authorized by this section. In promulgating such rules, the

Commission shall promote the most efficient and economical program of criminal justice training, including the maximum utilization of existing facilities and programs for the purpose of avoiding duplication.

(d) The Commission may provide grants as a reimbursement for actual expenses incurred by the State or political subdivision thereof for the provisions of training programs of officers from other jurisdictions within the State. (1971, c. 963, ss. 8, 9; 1979, c. 763, s. 1.)

Chapter 17D.

North Carolina Justice Academy.

Sec.

§ 17D-1. Definitions. — As used in this Chapter, unless the context otherwise requires:

(a) "Academy" means the North Carolina Justice Academy.

(b) "Academy property" means property that is owned or leased in whole or in part by the State of North Carolina and which is subject to the general management and control of the Department of Justice and is located in Salemburg, North Carolina, or at any other locations within the State which are dedicated to the use of the North Carolina Justice Academy subsequent to this Chapter being enacted.

(c) "The Commission" means the North Carolina Criminal Justice Education and Training Standards Commission.

(d) "Criminal justice agencies" means the State and local law enforcement agencies, the State and local police traffic service agencies, the State correctional agencies, the jails and other correctional agencies maintained by local governments, the courts of the State and the juvenile justice agencies.

(e) "Criminal justice personnel" means any person who serves or assists any State or local agency engaged in crime prevention, crime reduction, crime investigation, training or educating of persons employed by criminal justice agencies, or enforcement of the criminal law; or any person employed by a criminal justice agency.

(f) "Department" means the Department of Justice. (1973, c. 749; 1977, c. 831, s. 1; 1979, c. 763, s. 2.)

Editor's Note. — This Chapter is Chapter 17B as rewritten by Session Laws 1979, c. 763, s. 2, effective January 1, 1980, and recodified. Where appropriate, the historical citations to the sections in the former Chapter have been added to corresponding sections in the Chapter as rewritten and recodified.

§ 17D-2. Academy established; duties. — (a) The North Carolina Department of Justice shall establish a North Carolina Justice Academy.

(b) The Department of Justice shall employ the staff of the academy and direct its operations.

(c) Duties of the academy. The North Carolina Justice Academy shall have, but is not limited to, the following functions:

(1) It may provide training programs for criminal justice personnel.

(2) It may provide technical assistance upon request to criminal justice agencies to aid them in the discharge of their responsibilities.

(3) It may develop, publish, and distribute educational and training materials.

(4) It may take such other actions as may be deemed necessary or appropriate to carry out its assigned duties and responsibilities. (1973, c. 749; 1979, c. 763, s. 2.)

§ 17D-3. Donations. — The Department of Justice may accept for any of its purposes and functions under this Article any and all donations, both real and

personal, and grants of money from any governmental unit or public agency, or from any institution, person, firm or corporation. Any arrangements pursuant to this section shall be detailed in an annual report of the academy. Such reports shall include the identity of the donor, the nature of the transaction, and the conditions, if any. Any money received by the Department of Justice pursuant to this section shall be deposited in the State Treasury to the account of the academy. All moneys involved shall be subject to audit by the State Auditor. (1979, c. 763, s. 2.)

§ 17D-4. Application of State highway and motor vehicles laws at the academy; authority of Department of Justice to regulate traffic, etc. — (a) Except as otherwise provided in this section, all of the provisions of Chapter 20 of the General Statutes relating to the use of highways of the State and the operation of vehicles thereon are applicable to all streets, alleys, driveways, and parking lots on academy property. Nothing in this section modifies any rights of ownership or control of academy property, now or hereafter vested in the State of North Carolina ex rel., Department of Justice.

(b) The Department of Justice may by ordinance prohibit, regulate, divert, control, and limit pedestrian or vehicular traffic and the parking of vehicles and other modes of conveyance on the campus. In fixing speed limits, the Department of Justice is not subject to G.S. 20-141(f) or (g), but may fix any speed limit reasonable and safe under the circumstances as conclusively determined by the Department of Justice. The Department of Justice may not regulate traffic on streets open to the public as of right, except as specifically provided in this section.

(c) The Department of Justice may by ordinance provide for the registration of vehicles maintained or operated on the campus by any student, faculty member, or employee of the academy and may fix fees for such registration. The ordinance may make it unlawful for any person to operate an unregistered vehicle on the campus when the vehicle is required by the ordinance to be registered.

(d) The Department of Justice may by ordinance set aside parking lots on the campus for use by students, faculty, and employees of the academy and members of the general public attending schools, conferences, or meetings at the academy, visiting or making use of any academy facilities, or attending to official business with the academy. The Department of Justice may issue permits to park in these lots and may charge a fee therefor. The Department of Justice may also by ordinance make it unlawful for any person to park a vehicle in any lot or other parking facility without procuring the requisite permit and displaying it on the vehicle.

(e) The Department of Justice may by ordinance provide for the issuance of stickers, decals, permits or other indicia representing the registration of vehicles or the eligibility of vehicles to park on the campus and may by ordinance prohibit the forgery, counterfeiting, unauthorized transfer, or unauthorized use of such stickers, decals, permits or other indicia.

(f) Violation of an ordinance adopted under any portion of this section is a misdemeanor punishable by a fine of not more than fifty dollars ($50.00) or imprisonment for not more than 30 days, in the discretion of the court. An ordinance may provide that certain acts prohibited thereby shall not be enforced by criminal sanctions, and in such cases a person committing any such act shall not be guilty of a misdemeanor.

(g) An ordinance adopted under this section may provide that a violation will subject the offender to a civil penalty. Penalties may be graduated according to the seriousness of the offense or the number of prior offenses committed by the person charged. The Department of Justice may establish procedure for the collection of these penalties and may enforce the penalties by civil action in the

nature of debt. The Department of Justice may also provide for appropriate administrative sanctions if an offender does not pay a validly due penalty or has committed repeated offenses. Appropriate administrative sanctions include, but are not limited to, revocation of parking permits, termination of vehicle registration, and termination or suspension of enrollment in or employment by the academy.

(h) An ordinance adopted under this section may provide that any vehicle illegally parked may be removed to a storage area, in which case the person so removing the vehicle shall be deemed a legal possessor within the meaning of G.S. 44A-2(d).

(i) Evidence that a vehicle was found parked or unattended in violation of a council ordinance is prima facie evidence that the vehicle was parked by:

(1) The person holding an academy parking permit for the vehicle;

(2) If no academy parking permit has been issued for the vehicle, the person in whose name the vehicle is registered with the academy pursuant to subsection (c); or

(3) If no academy parking permit has been issued for the vehicle and the vehicle is not registered with the academy, the person in whose name it is registered with the North Carolina Department of Motor Vehicles or the corresponding agency of another state or nation.

The rule of evidence established by this subsection applies only in civil, criminal, or administrative actions or proceedings concerning violations of ordinances of the Department of Justice. G.S. 20-162.1 does not apply to such actions or proceedings.

(j) The Department of Justice shall cause to be posted appropriate notice to the public of applicable traffic and parking restrictions.

(k) All ordinances adopted under this section shall be filed in the offices of the North Carolina Attorney General and the Secretary of State. The Department of Justice shall provide for printing and distributing copies of its traffic and parking ordinances.

(l) All moneys received pursuant to this section shall be State funds as defined in G.S. 143-1. (1977, c. 831, s. 2; 1979, c. 763, s. 2.)

Chapter 18A.

Regulation of Intoxicating Liquors.

Article 1.

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Article 2.

A.B.C. Boards and Enforcement.

Part 1. A.B.C. Boards.

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Article 7.

Distilleries.

ARTICLE 1.

General Provisions.

§ 18A-2. Definitions. — When used in this Chapter:

(4) The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, mixed beverages, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt or fermented beverages, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one half of one percent (½ of 1%) or more of alcohol by volume, which are fit for use for beverage purposes.

(6) The term "mixed beverage" means a drink composed in whole or in part of alcoholic beverage and served to an individual in a quantity less than the quantity contained in a closed package, purchased for consumption on premises licensed for mixed beverages by the State Board of Alcoholic Control.

(1977, 2nd Sess., c. 1138, s. 1; 1979, c. 683, s. 1.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1977, in subdivision (6), substituted "means" for "as used in this Chapter is defined" and "beverage" for "beverages having an alcoholic content of more than fourteen percent of alcohol by volume" near the beginning of the subdivision and deleted "in a miniature bottle or" following "individual."

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

The 1979 amendment inserted "mixed beverages" near the beginning of subdivision (4).

As the rest of the section was not changed by the amendment, only the introductory language and subdivisions (4) and (6) are set out.

Cited in In re Hardy, 39 N.C. App. 610, 251 S.E.2d 643 (1979).

§ 18A-5. Manufacturing liquor, utensils, or stamps.

(b) It shall be unlawful for any person knowingly to permit or allow any distillery or other apparatus for the making or distilling of spirituous liquors to be set up for operation or to be operated on lands in his possession or control, except as expressly authorized in this Chapter.

(1979, c. 699, s. 1.)

Editor's Note. — The 1979 amendment, effective Jan. 1, 1980, added "except as expressly authorized in this Chapter" at the end of subsection (b).

Session Laws 1979, c. 699, s. 6, provides: "Nothing in this act shall prohibit the levy of additional license, permit, or other taxes on distilleries operating under this act."

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 18A-8. Sale to or purchase by minors. — (a) It shall be unlawful for:

(1) Any person, firm, or corporation knowingly to sell or give any malt beverages or unfortified wine to any person under 18 years of age;

(2) Any person under 18 years of age to purchase or possess, or for anyone to aid or abet such person in purchasing, any malt beverages or unfortified wine;

(3) Any person, firm, or corporation knowingly to sell or give any alcoholic beverages or mixed beverages to any person under 21 years of age; or

(4) Any person under 21 years of age to purchase or possess, or for anyone to aid or abet such a person in purchasing, any alcoholic beverages or mixed beverages.

(b) Whenever a sale of malt beverages or unfortified wine is made to a person under the age of 18 years, or a sale of alcoholic beverage or mixed beverage is made to a person under the age of 21 years, it shall be prima facie evidence that the person making the sale had knowledge that the purchaser was under the required age for purchase. Such prima facie evidence may be rebutted by showing that the purchaser produced for inspection a driver's license, or military identification card showing the age of the purchaser to be at least the age required for that purchase, and that the description of the physical appearance of the person on the identification card reasonably described the purchaser. In the absence of such identification, the prima facie evidence of knowledge of age may be rebutted by the vendor by other evidence which reasonably indicated at the time of sale that the purchaser was at least the age required for the purchase. (1933, c. 216, s. 8; 1959, c. 745, s. 1; 1967, c. 222, s. 3; 1969, c. 998; 1971, c. 872, s. 1; 1973, c. 27; 1977, 2nd Sess., c. 1138, s. 2; 1979, c. 683, s. 2.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1977, inserted "or mixed beverages" in subdivision (a)(3) and added "or mixed beverages" at the end of subdivision (a)(4).

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

The 1979 amendment, in subsection (b), inserted "or a sale of alcoholic beverage or mixed beverage is made to a person under the age of 21 years" near the middle of the first sentence, substituted "the required age for purchase" for "the age of 18 years" at the end of the first sentence, deleted "selective service card" following "driver's license" and substituted "at least the age required for that purchase, and that" for "18 years or more and" near the middle of the second sentence, and substituted "at least the age required for the purchase" for "18 years of age or more" at the end of the last sentence.

Cited in In re Hardy, 39 N.C. App. 610, 251 S.E.2d 643 (1979).

§ 18A-9: Repealed by Session Laws 1979, c. 699, s. 2, effective January 1, 1980.

§ 18A-13: Repealed by Session Laws 1977, 2nd Sess., c. 1138, s. 19, effective July 1, 1977.

Cross Reference. — For present provisions as to mixed beverage permits, see §§ 18A-30, 18A-31.

ARTICLE 2.

A.B.C. Boards and Enforcement.

Part 1. A.B.C. Boards.

§ 18A-14. State Board of Alcoholic Control. — (a) A State Board of Alcoholic Control is hereby created, and shall consist of a Chairman and two associate members. The Chairman and associate members of the Board shall be well known for their character, ability, and business acumen. The Chairman of the Board shall devote his full time to his official duties. He shall receive a salary to be fixed by the Governor, subject to the approval of the Advisory Budget Commission, together with necessary traveling expenses allowed under the general law. The two associate members of the Board shall receive no compensation for their services except the per diem, subsistence, and travel allowances provided for members of similar State boards and commissions by Chapter 138 of the General Statutes.

(1979, c. 336.)

Editor's Note. — The 1979 amendment deleted "men" after "shall be" in the second sentence of subsection (a). As subsection (b) was not changed by the amendment, it is not set out.

§ 18A-15. Powers and authority of State Board. — The State Board of Alcoholic Control shall have power and authority as follows:

(1) In conjunction with the Alcohol Law-Enforcement Division of the Department of Crime Control and Public Safety, to see that all the laws relating to the sale and control of intoxicating liquor are observed and performed.

(2) To audit and examine the accounts, records, books, and papers relating to the operation of county and municipal stores or to have the same audited.

(3) a. To fix the retail price of each bottle of alcoholic beverages sold in the county and municipal A.B.C. stores at such levels as shall promote the temperate use of these beverages and as may facilitate policing, which price shall be uniform throughout the State;

b. To compute the taxes levied by G.S. 105-113.93 and 105-113.94 on the retail prices of spirituous liquors so fixed;

c. To add to said retail price:

1. An amount equal to three and one-half percent (3½%) of said retail price of spirituous liquors; and

2. One cent (1¢) per bottle on each bottle of alcoholic beverages containing fifty milliliters or less sold in said county and municipal A.B.C. stores and five cents (5¢) per bottle on each bottle of alcoholic beverages containing more than fifty milliliters sold in said stores; the sum of the retail price plus the foregoing additions thereto being the established price for each such bottle of alcoholic beverages. The foregoing additions to retail price shall not be subject to the tax levied by G.S. 105-113.93 and 105-113.94. The clear proceeds of the three and one-half percent (3½%) addition to the retail price of spirituous liquors shall be retained by the respective county or municipal A.B.C. boards in the same manner as other profits derived from the sale of spirituous liquors. The clear proceeds of the one cent (1¢) and five cents (5¢) per bottle addition to retail price shall be remitted to the county commissioners of the county in which such additions to retail price were collected, accompanied by forms or reports to be prescribed and furnished by the State Board of Alcoholic Control, which remittances shall be spent in the discretion of the county commissioners only for projects for construction, maintenance and operation of facilities for education, research, treatment or rehabilitation of alcoholics. In connection with such projects and programs, the county commissioners, or such agencies as are by them designated, shall also have the authority to use said funds to purchase or lease real and personal property, and to renovate, remodel, furnish and equip buildings as and when required for the operation of such projects and programs. The funds may also be used for programs of education and research on problems of alcoholism and the treatment and rehabilitation of alcoholics. The county commissioners are hereby empowered to spend the funds for a project not located

in the county but which benefits the citizens of the county. The Department of Human Resources and the State Department of Public Instruction are hereby empowered to enact guidelines for the expenditure of such funds by county commissioners and the county commissioners may expend the funds pursuant to those guidelines. Reports and remittances of the aforesaid additions to retail price shall be made monthly by the local boards on or before the fifteenth day of the next succeeding month.

3. Ten dollars ($10.00) on each four liters and a proportional sum on any lesser amount, of spirituous liquor sold to the holder of a mixed beverages permit for the purpose of resale as mixed beverages. This addition to the retail price shall not be subject to the tax levied by G.S. 105-113.93. The clear proceeds from this addition to the retail price of spirituous liquor shall be retained by the respective county or municipal A.B.C. boards in the same manner as other profits derived from the sale of spirituous liquors, except that ten percent (10%) of the proceeds shall be directed to the Department of Human Resources for rehabilitation of alcoholics and research into the causes of alcoholism. When the spirituous liquor is purchased at a city A.B.C. store by a mixed beverage permit holder for premises located at an airport outside the city, the A.B.C. board share of the ten dollar ($10.00) addition shall be divided equally among the A.B.C. boards of all the cities in that county that have authorized the sale of mixed beverages.

d. To determine the total prices of all such alcoholic beverages, which total price shall be the sum of the established price plus the taxes levied by G.S. 105-113.93 and 105-113.94, and to notify the stores periodically of such prices.

e. To authorize a county or municipal A.B.C. board to sell certain alcoholic beverages at below the uniform price subject to the rules and regulations of the State A.B.C. Board.

(4) To remove any member, or members, of county and municipal boards whenever in the opinion of the State Board such member, or members, of the county or municipal board, or boards, may be unfit to serve thereon.

(5) To test any and all alcoholic beverages that may be sold, or proposed to be sold, to the county or municipal stores, and to install and operate such apparatus, laboratories, or other means or instrumentalities and employ to operate the same such experts, technicians, employees and laborers as may be necessary to operate the same, in accordance with the opinion of the Board. In lieu of establishing and operating laboratories as above directed, the Board may, with the approval of the Governor and the Commissioner of Agriculture, arrange with the State Chemist to furnish such information and advice and to perform such analyses and other laboratory services as the Board may consider necessary, or they may, if they deem advisable, cause such tests to be made otherwise.

(6) To supervise purchasing by the county and municipal boards when the State Board is of the opinion that it is advisable for it to exercise such power in order to carry into effect the purpose and intent of this Chapter, with full power to disapprove any such purchase. At all times it shall have the right to inspect all invoices, papers, books, and records in the county or municipal stores or boards relating to purchases.

(7) To exercise the power to approve or disapprove in its discretion all regulations adopted by the several county and municipal stores for the

operation of said stores and the enforcement of alcoholic beverage control laws which may be in violation of the terms or spirit of this Chapter.

(8) To require that a sufficient amount be so allocated as to insure adequate enforcement; the amount shall in no instance be less than five percent (5%) nor more than ten percent (10%) of the net profits arising from the sale of alcoholic beverages.

(9) To remove, in case of violation of the terms or spirit of this Chapter, officers employed, elected, or appointed in the several counties and municipalities where stores may be operated.

(10) To approve or disapprove, in its discretion, the opening and location of county and municipal stores; provided that in the location of control stores in any county in which a majority of the votes have been cast for liquor control stores, no store or stores shall be located in any community or town in which a majority of the votes cast were against control; provided further, however, that stores may be located in such communities and towns if and when as many as twenty percent (20%) of the qualified voters therein by petition, at any time after 18 months since the last election on such question, have requested the location of such a store or stores in such communities or towns and the State Board has found, upon due investigation after receipt of such petition, that a majority of the qualified electors in such community or town are at the time such investigation is made in favor of establishing such store or stores. Each county and municipality that may be entitled to operate stores for the sale of alcoholic beverages shall be entitled to operate at least one store for such purpose. No additional stores in each of said counties and municipalities shall be opened until and unless their opening and their place of location shall first be approved by the State Board, which at any time may withdraw its approval of the operation of any additional county or municipal store when the store is not operated efficiently and in accordance with the alcoholic beverage control laws and all valid regulations prescribed therefor, or whenever, in the opinion of the State Board, the operation of any county or municipal store shall be inimical to the morals or welfare of the community in which it is operated or for such other cause, or causes, as may appear to the State Board sufficient to warrant the closing of any county or municipal store.

(11) To require the use of a uniform accounting system in the operation of all county and municipal stores hereunder and to provide in said system for the keeping therein and the record of all such information as may, in the opinion of the said State Board, be necessary or useful in its auditing of the affairs of the said county and municipal stores, as well as in the study of such problems and subjects as may be studied by said State Board in the performance of its duties.

(12) To grant, to refuse to grant, or to revoke permits for any person, firm, or corporation to do business in North Carolina in selling alcoholic beverages to or for the use of any county or municipal store and to provide and to require that such information be furnished by such person, firm, or corporation as a condition precedent to the granting of such permit, or permits, and to require the furnishing of such data and information as it may desire during the life of such permit, or permits, and for the purpose of determining whether such permit, or permits, shall be continued, revoked, or regranted after expiration dates. No permit, however, shall be granted by the State Board to any person, firm, or corporation when the State Board has reason sufficient unto itself to believe that such person, firm, or corporation has furnished to it any false or inaccurate information or is not fully, frankly, and

honestly cooperating with the State Board, the Alcohol Law Enforcement Division, and the several county and municipal boards in observing and performing all liquor laws that may now or hereafter be in force in this State, or whenever the Board shall be of opinion that such permit ought not to be granted or continued for any cause. Upon the granting of a permit in accordance with this Chapter, the State Board of Alcoholic Control shall notify the county sheriff and county tax collector, and if applicable, the city chief of police and city tax collector, as well as the county alcoholic beverage control officer, whenever an alcoholic beverage control permit of any type is issued within the respective county and/or city.

(13) On or before June 30, 1975, and thereafter to provide for the receipt, storage and distribution of spirituous liquors by negotiated contract or by use of the procedures for purchase and contract of property by State agencies with a privately owned warehouse in the Raleigh area or, alternatively and by the same procedure, with privately owned warehouses in the several regions of the State which in the discretion of the Board would promote efficient distribution of spirituous liquors to the local boards of alcoholic control and maintain control of such beverages and the Board's supervision thereof. The State Board of Alcoholic Control shall provide for such warehousing and distribution through contracts or subleases with independent contractors, except that the State Board shall have the power and authority to operate such warehouses on an interim emergency or temporary basis pursuant to a change in independent operator or for some condition substantially impeding distribution of spirituous liquors from the warehouse. The Board shall prescribe such rules and regulations as they deem necessary for the receipt, storage and distribution of such beverages and violation of such rules and regulations shall be grounds for termination of a contract upon reasonable notice by the Board. The contract or contracts entered into pursuant to this subdivision shall provide for an annual audited financial statement, shall provide that the records of the warehouse or warehouses be available for inspection at all times by the State Board of Alcoholic Control and the Department of Revenue and shall provide that the accounts of the warehouse or warehouses regarding the receipt, storage and distribution of spirituous liquors be subject to audit by the State Auditor.

(14) To adopt, amend, or repeal reasonable rules and regulations for the purpose of carrying out the provisions of this Chapter, but not inconsistent herewith, which rules and regulations shall become effective when filed as provided by law.

(15) To appoint or commission one or more hearing officers who shall have the full authority to make investigations, hold hearings, and make findings of fact. Upon the approval by the State Board of the findings and orders of suspension or revocation of the permit of any licensee made and entered by any such hearing officer, the findings of such hearing officer shall be deemed to be the findings and the order of the Board.

(16) The Board is authorized to dispose of damaged liquors belonging to the Board by selling it to public or private hospitals to be used only for medicinal purposes, or by sale to military installations or by destroying such liquors as the Board may deem best. Sale shall be by:

a. Advertisement for sealed bids;
b. Negotiated offer, advertisement, and upset bids;
c. Public auction; or
d. Exchange.

Complete detailed records of such disposal shall be maintained by the Board showing the brand, amount and disposition. Any funds derived from such liquors shall be paid into the warehouse bailment fund.

(17) To provide for the storage and transportation of alcoholic beverages for special occasions for a period of 48 hours prior to and following a special occasion by regulation and by the issuance of permits needed for control of such storage and transportation; provided, however, the transportation of alcoholic beverages shall be limited to 40 liters at any one time.

(18) To adopt rules for the special labeling of containers of alcoholic beverages sold for resale in mixed beverages, and to require the holders of mixed beverages permits to maintain records of alcoholic beverages purchased and sold as mixed beverages and to maintain records of monthly sales of mixed beverages separate from other sales.

The State Board shall have all other powers which may be reasonably implied from the granting of express powers herein named, together with such other powers as may be incidental to, or convenient for, carrying out and performing the powers and duties herein given to the Board. (1937, c. 49, s. 4; cc. 237, 411; 1945, c. 954; 1949, c. 974, s. 9; 1961, c. 956; 1963, c. 426, s. 12; c. 916, s. 2; c. 1119, s. 1; 1965, c. 1063; c. 1102, s. 3; 1967, c. 222, s. 2; c. 1240, s. 1; 1971, c. 872, s. 1; 1973, c. 28; c. 473, s. 1; c. 476, s. 133; c. 606; c. 1288, s. 1; cc. 1369, 1396; 1975, cc. 240, 453, 640; 1977, c. 70, ss. 15.1, 15.2, 16; c. 176, ss. 2, 6; 1977, 2nd Sess., c. 1138, ss. 3, 4, 18; 1979, c. 384, s. 1; c. 445, s. 5; c. 482; c. 801, s. 4.)

Local Modification. — City of Rockingham, as to subdivision (8): 1979, c. 221.

Editor's Note. —

Session Laws 1977, 2nd Sess., c. 1138, s. 3, effective July 1, 1977, added paragraph 3 to subdivision (3)c and added subdivision (18).

Session Laws 1977, 2nd Sess., c. 1138, s. 18, effective January 1, 1978 (the effective date of Session Laws 1977, c. 176), amended paragraph 3 of subdivision (3)c by substituting "four liters" for "gallon" near the beginning of the first sentence.

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

The first 1979 amendment added the last sentence of paragraph (3)c 3.

The second 1979 amendment substituted "40 liters" for "20 liters" near the end of subdivision (17).

The third 1979 amendment added paragraph (3)e.

The fourth 1979 amendment, effective Oct. 1, 1979, substituted "spirituous liquors" for "alcoholic beverages" in three places in the first sentence of paragraph (3)c 2.

Section 105-113.94, referred to in two places in subdivision (3) of this section, was repealed by Session Laws 1975, c. 53, s. 3.

§ 18A-16. County boards of alcoholic control.

Local Modification. — Camden: 1977, 2nd Sess., c. 1171; Edgecombe: 1977, 2nd Sess., c. 1155; Orange: 1979, c. 385; Pasquotank: 1979, c. 823; Wake: 1979, c. 278.

§ 18A-17. Powers and duties of county boards. — The said county boards shall each have the following powers and duties:

(16) To invest any funds temporarily held in any form of investment allowed by law to the State Treasurer under G.S. 147-69.1, except that no such investments authorized herein shall be for periods of more than 90 days.

(18) If the sale of unfortified wine has been approved in a local election in the city or county in which the A.B.C. store is located, to sell unfortified wine derived principally from fruits and berries grown in North Carolina.

(1979, c. 467, s. 20; c. 617.)

Local Modification. — Craven, as to subdivision (14): 1979, c. 677; Highlands, as to subdivision (14): 1979, c. 116; Pamlico, as to subdivision (14): 1979, c. 121.

Editor's Note. —

The first 1979 amendment rewrote subdivision (16).

The second 1979 amendment added subdivision (18).

As the rest of the section was not changed by the amendments, only the introductory language and subdivisions (16) and (18) are set out.

Subdivision (18) Is Constitutional. — Section 18A-17(18) which allows certain A.B.C. stores to sell unfortified wine derived principally from fruits and berries grown in North Carolina is constitutional. See opinion of Attorney General to Honorable Carolyn Mathis, Member N.C. Senate, 48 N.C.A.G.

§ 18A-20. Powers of local officers.

Editor's Note. — Section 97-1.1 provides that any act referring to the Workmen's Compensation Act, as in subsection (c) of this section, shall be deemed to refer to the Workers' Compensation Act.

ARTICLE 3.

Sale, Consumption, Possession and Transportation of Alcoholic Beverages.

§ 18A-25. Prohibited sales.

(b) The possession for sale, or sales, of any liquor purchased from any county or municipal store, except as authorized by this Chapter, is prohibited. (1937, c. 49, ss. 11, 15; c. 411; 1971, c. 872, s. 1; 1977, 2nd Sess., c. 1138, s. 5.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1977, inserted "except as authorized by this Chapter" and deleted "hereby" preceding "prohibited" in subsection (b).

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

As subsection (a) was not changed by the amendment, it is not set out.

Cited in State ex rel. Jacobs v. Sherard, 36 N.C. App. 60, 243 S.E.2d 184 (1978).

§ 18A-26. Transportation of alcoholic beverages. — (a) A person may transport, not for sale or barter, not more than four liters of alcoholic beverages, except as authorized by permit, to and from any place in the State; but if the cap or seal on the container or containers has been opened or broken, it shall be unlawful to transport the same in the passenger area of any motor vehicle. Transportation in the passenger area of such a container or containers whose cap or seal has been opened or broken, so long as the quantity of alcoholic beverages does not exceed four liters, shall be a misdemeanor punishable by a fine of not less than twenty-five dollars ($25.00) nor more than five hundred dollars ($500.00), imprisonment for not more than 30 days, or both.

It shall be unlawful for any person operating a for-hire passenger vehicle as defined in G.S. 20-4.01(27)b to transport alcoholic beverages except when the vehicle is actually transporting a bona fide paying passenger who is the actual owner of the alcoholic beverages being transported. Alcoholic beverages owned and possessed by each passenger shall be transported in the manner and amount authorized by this section, provided that the provisions of G.S. 20-16(a)(8) shall not apply to a person convicted under this section. The transportation of up to four liters of alcoholic beverages shall not be ground for confiscation of the motor vehicle.

(b) A person may purchase legally outside of this State and bring into the State for his own personal use not more than four liters of alcoholic beverage:

Provided, that the container or containers of said alcoholic beverages are maintained within any vehicle as regulated and provided for in this Chapter. (1923, c. 1, s. 25; C. S., s. 3411(y); 1937, c. 49, ss. 14, 16; c. 411; 1967, c. 222, ss. 1, 7; c. 1256, s. 3; 1969, c. 598, ss. 2, 3; c. 1018; 1971, c. 872, s. 1; 1977, c. 176, s. 1; c. 586; 1979, c. 607, s. 1.)

Editor's Note. —
The 1979 amendment, effective October 1, 1979, added the last sentence of the first paragraph of subsection (a).

Session Laws 1979, c. 607, s. 2, provides: "This act shall become effective October 1, 1979, and shall apply to all cases tried on or after that date."

§ 18A-27. Transportation of up to 40 liters of fortified wine. — (a) Whenever any person desires to purchase or transport more than four liters but not exceeding 40 liters of fortified wine at one time (from an A.B.C. store or any retail permittee), he shall first obtain a "purchase-transportation permit" from the chairman of the local A.B.C. board, a member of the local board, or the general manager or supervisor of the local board of alcoholic control. No permit shall be issued by any authorized person to:

(1) Persons not of good character; or
(2) Persons not sufficiently identified, if unknown to the issuing person; or
(3) Persons known or shown to be alcoholics or bootleggers.

(b) The permit shall be signed by the person authorized to issue same and it shall authorize the purchaser named therein to purchase and transport the quantity of fortified wine therein indicated not to exceed 40 liters. The permit shall be issued by means of a printed form with at least two carbon copies of the same, and on the face of the permit shall appear the following information:

(1) Name and address of purchaser;
(2) The name and location of the place where purchase is to be made;
(3) Date issued and expiration date;
(4) Destination;
(5) Signature of person issuing the permit;
(6) A statement that the permit is valid for only one purchase on the date shown and that the permit must accompany the merchandise during transit and both the merchandise and the permit must be exhibited by purchaser to any law-enforcement officer upon request.

(c) The permit herein authorized shall be valid for only one purchase, and it shall expire at 9:30 P.M. of the date shown thereon. No purchase shall be made from any store except the store named on the permit. One copy of the permit shall be retained by the board issuing the same, one copy shall be delivered to the store from which the merchandise is purchased, and one copy shall be retained by the permittee. The permit shall authorize the permittee to transport fortified wine from the place of purchase to the destination indicated thereon. It must accompany the merchandise during transit, and both the merchandise and the permit must be exhibited to any law-enforcement officer upon request.

(d) The chairman or any member of a local county or municipal board or the general manager or supervisor of a local alcoholic control board is authorized to issue purchase-transportation permits.

(e) Permits to be used shall be in the form substantially as follows:

ALCOHOLIC BEVERAGE CONTROL BOARD

. . . . . County
. . . . . ., North Carolina
Date . . . . . ., 19 . . . . .

PURCHASE-TRANSPORTATION PERMIT

(not to exceed 40 liters)

Name of Purchaser . . . . . .
Address . . . . . .
Name of Store . . . . . Address of Store. . . . . .
Destination . . . . . .
Route to Be Used . . . . . .
Signed . . . . . .
(Person authorized to issue)
Board Member

Note: This permit is valid for only one purchase and it shall expire at 9:30 P.M. of the date shown above. Special Note: This permit must accompany the merchandise while in transit. Both the merchandise and the permit must be exhibited to any law-enforcement officer upon request.

(f) No person convicted of, or who has entered a plea of guilty or no contest to, any offense involving the sale, possession or transportation of nontaxpaid liquor, or any offense involving the sale of intoxicating liquor without a permit, whether a State or federal offense, within a period of three years of applying for the purchase-transportation permit, shall be entitled to the provisions of this section and any permit issued to such person shall be invalid. Any person convicted of procuring a purchase-transportation permit in violation of this section shall be guilty of a misdemeanor and punished as provided by G.S. 18A-56. (1971, c. 872, s. 1; 1977, c. 176, ss. 1, 2; 1979, c. 19, ss. 3, 4; c. 445, s. 3; c. 1076, s. 1.)

Editor's Note. —

The first 1979 amendment substituted "9:30 P.M." for "6:00 P.M." in the first sentence of subsection (c) and near the end of the permit form in subsection (e).

The second 1979 amendment substituted "40 liters" for "20 liters" in the first sentences of subsections (a) and (b) and in the permit form in subsection (e).

The third 1979 amendment added subsection (f).

§ 18A-28. Transportation of up to 40 liters of alcoholic beverages. — (a) It shall be lawful to purchase, possess, and transport up to 40 liters of alcoholic beverages in containers not smaller than 750 milliliters from a county or municipal A.B.C. store to a named destination within the county or counties adjacent thereto; provided, the purchaser has in his possession a "purchase-transportation permit" and complies strictly with the provisions of this section, and provided further that said alcoholic beverages are not being transported for the purpose of sale and that the cap or seal on the container or containers of said alcoholic beverages has not been opened or broken.

(c) The permit shall be signed by the person authorized to issue it, and it shall authorize the purchaser named therein to purchase and transport the quantity of alcoholic beverages therein indicated not to exceed 40 liters. The permit shall be issued by means of a printed form with at least two carbon copies. On the face of the permit shall appear the following information:

(1) Name and address of purchaser;
(2) The name and location of the place where purchase is to be made;
(3) Date issued and expiration date;
(4) Destination;
(5) Signature of person issuing the permit;
(6) A statement that the permit is valid for only one purchase on the date shown and that the permit must accompany the merchandise during transit and both the merchandise and the permit must be exhibited by purchaser to any law-enforcement officer upon request.

(f) Permits to be used shall be in the form substantially as follows:

ALCOHOLIC BEVERAGE CONTROL BOARD

. . . . . County
. . . . . ., North Carolina
Date . . . . . ., 19 . . . . . .

PURCHASE-TRANSPORTATION PERMIT

(not to exceed 40 liters)

Name of Purchaser . . . . . .
Address . . . . . .
A.B.C. Store No. . . . . Address of the Store . . . . . .
Destination . . . . . .
Route to Be Used . . . . . .
Signed . . . . . .
(Person authorized to issue)
Board Member

Note: This permit is valid for only one purchase and it shall expire at 9:30 P.M. of the date shown above. Special Note: This permit must accompany the merchandise while in transit. Both the merchandise and the permit must be exhibited to any law-enforcement officer upon request.

(h) No person convicted of, or who has entered a plea of guilty or no contest to, any offense involving the sale, possession or transportation of nontaxpaid liquor, or any offense involving the sale of intoxicating liquor without a permit, whether a State or federal offense, within a period of three years of applying for the purchase-transportation permit, shall be entitled to the provisions of this section and any permit issued to such person shall be invalid. Any person convicted of procuring a purchase-transportation permit in violation of this section shall be guilty of a misdemeanor and punished as provided by G.S. 18A-56. (1969, c. 617, s. 1; 1971, c. 872, s. 1; 1973, c. 94; c. 819, s. 1; 1975, ss. 1-4; 1977, c. 176, ss. 1, 2, 4; 1979, c. 286, s. 1; c. 445, s. 1; c. 1076, ss. 2, 3.)

Editor's Note. —

The first 1979 amendment, which was repealed by the third 1979 amendment, deleted "in containers not smaller than 750 milliliters" following "liters of alcoholic beverages" near the beginning of subsection (a).

The second 1979 amendment substituted "40 liters" for "20 liters" near the beginning of subsection (a), in the first sentence of subsection (c), and in the permit form in subsection (f).

The third 1979 amendment repealed the first 1979 amendment to subsection (a) and added subsection (h).

As only subsections (a), (c), (f) and (h) were changed by the amendments, the rest of the section has not been set out.

§ 18A-29. Commercial transportation of spirituous liquors. — (a) The willful transportation of spirituous liquors within, into, or through the State of North Carolina in quantities in excess of four liters (or 40 liters with a permit) is prohibited except for delivery to federal reservations to which has been ceded exclusive jurisdiction by the State of North Carolina, for delivery to an A.B.C. store or board, for transport through this State to another state, or for delivery to premises holding a mixed beverages permit under the conditions set forth in this Chapter. The State Board of Alcoholic Beverage Control may adopt further regulations governing the transportation of spirituous liquors within, into, and through the State of North Carolina for delivery to a federal reservation, A.B.C. stores or boards, or in transit through this State to another state, as it may deem

necessary to confine such transportation to legitimate purposes, and may issue transportation permits in accordance with such regulations.

(b) Before any person shall transport over the roads and highways of this State any spirituous liquors in excess of four liters (or 40 liters with a permit) within, into, or through the State of North Carolina for delivery to a federal reservation exercising exclusive jurisdiction, or in transit through this State to another state, he shall post with the State Board of Alcoholic Beverage Control a bond with surety approved by the Board, payable to the State of North Carolina in the penal sum of one thousand dollars ($1,000), running in the name of the State of North Carolina, conditioned that such person will not unlawfully transport or deliver any spirituous liquors within, into, or through the State of North Carolina. In case of conviction, the forfeiture shall be paid to the school fund of the county in which the seizure is made, and any such county shall have the right to sue for the same. When such spirituous liquors are desired to be transported within, into, or through the State of North Carolina, the transportation shall be engaged in only under the following conditions:

(1) Statement as to Bond and Bill of Lading Required. — There shall accompany said spirituous liquors a true and exact copy of the numbered fleet permit issued to the authorized carrier and signed by the Chairman of the State Board of Alcoholic Beverage Control. Said permit and copies shall verify that the bond hereinbefore required has been furnished and approved and is current for the ensuing year. Each permit copy shall bear the fleet carrier's certificate that it is a true and exact copy of the original permit issued by the Board. There shall accompany said spirituous liquors, at all times during transportation, a bill of lading or other memorandum of shipment signed by the consignor showing an exact description and the North Carolina code numbers of the spirituous liquors being transported and the name and address of the consignee. Each carrier applying for a fleet permit and transporting spirituous liquors into, out of, or between points in this State over the public highways of this State, shall keep current files of their routes over which they are authorized to transport the same, and shall not unreasonably deviate from said routes.

(2) Route Stated in Bill of Lading to Be Followed. — Vehicles transporting spirituous liquors shall not substantially vary from the route specified in the bill of lading or other memorandum of shipment.

(3) Names of True Consignor and Consignee Must Appear. — The name of the consignor on any such bill of lading or other memorandum of shipment shall be the name of the true consignor of the spirituous liquors being transported, and such consignor shall be only a person who has a legal right to make such shipment. The name of the consignee on any such bill of lading or memorandum of shipment shall be the name of the true consignee of the spirituous liquors being transported and who had previously authorized in writing the shipment of the spirituous liquors being transported and who has a legal right to receive such spirituous liquors at the point of destination shown on the bill of lading or other memorandum of shipment.

(4) Officers May Require Driver to Exhibit Papers. — The driver or any person in charge of any vehicle so transporting such spirituous liquors shall, when required by any sheriff, deputy sheriff, or other peace officer having the power to make arrests, exhibit to such officer such papers or documents required by this law to accompany such shipment.

(d) Notwithstanding any other provision in this Chapter, any distillery operating under the laws of this State may, without a transportation permit, transport into or out of that distillery the maximum amount of intoxicating liquor allowed under federal law, as long as the transportation is related to the distilling process. (1945, c. 457, ss. 1, 2; 1965, c. 1102, s. 4; 1971, c. 872, s. 1; 1975,

c. 411, s. 5; c. 586, s. 2; 1977, c. 176, ss. 1, 2; 1977, 2nd Sess., c. 1138, ss. 6, 18; 1979, c. 286, s. 2; c. 445, s. 2; c. 699, s. 3.)

Editor's Note. —

Session Laws 1977, 2nd Sess., c. 1138, s. 6, effective July 1, 1977, deleted "or" preceding "for transport" and added "or for delivery to premises holding a mixed beverages permit under the conditions set forth in this Chapter" in the first sentence of subsection (a) as it stood before the amendment in Session Laws 1977, c. 176.

Session Laws 1977, 2nd Sess., c. 1138, s. 18, effective Jan. 1, 1978 (the effective date of Session Laws 1977, c. 176), amended the first sentence of subsection (a) of this section as amended by Session Laws 1977, 2nd Sess., c. 1138, s. 6, by substituting "four liters" for "one gallon" and "20 liters" for "five gallons" near the beginning of the first sentence.

The first 1979 amendment, in subdivision (1) of subsection (b), substituted "a true and exact copy of the numbered fleet permit issued to the authorized carrier and" for "a statement" near the beginning of the first sentence, added the second and third sentences, inserted "and the North Carolina code numbers" and inserted "and" following "the spirituous liquors being transported" near the end of the fourth sentence, deleted "and the route to be traveled by the vehicle while in the State of North Carolina; this route must be substantially the most direct route from the consignor's place of business to the place of business of the consignee" at the end of the fourth sentence, and added the fifth sentence.

The second 1979 amendment substituted "40 liters" for "20 liters" in the first sentences of subsections (a) and (b).

The third 1979 amendment, effective Jan. 1, 1980, added subsection (d).

Session Laws 1979, c. 699, s. 6, provides: "Nothing in this act shall prohibit the levy of additional license, permit, or other taxes on distilleries operating under this act."

As subsection (c) was not changed by the amendments, it is not set out.

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

§ 18A-29.1. Transportation of alcoholic beverages by holder of mixed beverages permit. — (a) A person holding a mixed beverages permit, or his designated employee, may purchase, possess, and transport more than four liters of alcoholic beverages in containers not smaller than 750 milliliters if he has in his possession a mixed beverages purchase-transportation permit issued under this section and complies with the provisions of this section and if none of the containers of the alcoholic beverages have had the cap or seal opened or broken.

(b) The mixed beverages purchase-transportation permit may be issued only by the chairman, a member, or the general manager or supervisor of the local alcoholic beverage control board for the county or city within which the premises holding the mixed beverages permit is located. However, if the authorization for mixed beverage sales has been by a city election, and the permit holder's premises is located at an airport outside the city, the purchase-transportation permit may be issued by the chairman, a member, or the general manager or supervisor of the city A.B.C. board for any city which is in the same county as the airport and which has authorized the sale of mixed beverages. The local A.B.C. board may designate a special store within the system to sell alcoholic beverages to be used in mixed beverages.

(c) The purchase-transportation permit shall authorize the holder of the mixed beverages permit, or his designated employee, to purchase and transport the quantity of alcoholic beverages stated on the permit. The following information shall appear on the face of the permit:

(1) The name and address of the holder of the mixed beverages permit and the registration number of the premises assigned by the State A.B.C. Board;

(2) The name of the employee authorized to purchase and transport the alcoholic beverages;

(3) The name and location of the store where the purchase is to be made;
(4) The date issued and the expiration date;
(5) The destination;
(6) The signature of the persons issuing and receiving the permit;
(7) A statement that the permit is valid for only one purchase on the date shown and that the permit must accompany the alcoholic beverages during transit and that both the alcoholic beverages and the permit must be displayed to any law-enforcement officer upon request; and
(8) Such additional information as may be required by the State A.B.C. Board.

In addition, the permit shall include a space for listing the serial number of each case or carton of alcoholic beverages purchased, to be completed at the time of the sale.

(d) The permit shall be valid for only one purchase and shall expire at 9:30 P.M. on the date shown on it. The permit must accompany the alcoholic beverages during transit and both the alcoholic beverages and permit must be displayed to any law-enforcement officer upon request. (1977, 2nd Sess., c. 1138, ss. 7, 18; 1979, c. 384, s. 2.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1138, s. 20, makes this section effective July 1, 1977.

Session Laws 1977, 2nd Sess., c. 1138, s. 18, effective Jan. 1, 1978 (the effective date of Session Laws 1977, c. 176), amends subsection (a) of this section as enacted by Session Laws 1977, 2nd Sess., c. 1138, s. 7, by substituting "four liters" for "one gallon" and "750 milliliters" for "one-fifth gallon" in subsection (a).

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

The 1979 amendment deleted "and may authorize the purchase and transportation of alcoholic beverages only within that county or city" at the end of the first sentence, and added the second sentence of subsection (b).

§ 18A-30. Possession and consumption of alcoholic beverages at designated places. — It shall be lawful in any county or municipality of this State for any person who is at least 21 years of age to possess, for lawful purposes, alcoholic beverages in quantities not in excess of four liters, unless otherwise authorized, provided that these alcoholic beverages are obtained from an authorized alcoholic beverage control store within this State or from a lawful source outside this State, and provided that said alcoholic beverages are possessed for a purpose other than for sale or barter (except where authorized by law), and provided that said alcoholic beverages are purchased, possessed, and consumed in accordance with this and other applicable sections of this Chapter, including the following:

(2) Social Establishments. — Any person, association, or corporation may furnish facilities located on its premises, which facilities shall not be open to the general public, for the storage of alcoholic beverages for its bona fide members, in quantities not in excess of four liters for each member, unless otherwise authorized, and for consumption by its members and their guests, but subject to the following conditions:
a. The establishment is organized and operated solely for purposes of a social, recreational, patriotic, or fraternal nature; and
b. It has a valid permit from the State Board of Alcoholic Control for this purpose; and
c. The alcoholic beverages are stored in individual lockers and the name of the beverage owner shall be clearly displayed on both the locker and the bottle or bottles; and
d. Any alcoholic beverage stored in any locker is for the exclusive use of the member and his guests and not to be sold or distributed to any other person.

The State A.B.C. Board may adopt regulations to fulfill the intent of this subsection that permits be issued only to social establishments that are organized and operated solely for social, recreational, patriotic or fraternal purposes and are bona fide private clubs. Such regulations may include, but need not be limited to, requirements that the social establishment have a membership committee to review all applications for membership, that the establishment charge membership dues substantially greater than what would be paid by a one-timer or casual user of the premises, that the establishment restrict use by nonmembers, that the establishment provide facilities or activities other than those directly related to the consumption of intoxicating liquor, that members' alcoholic beverages and their use be kept separate from alcoholic beverages possessed for resale in mixed beverages, and that the establishment have a waiting period between receiving an application and granting membership. The waiting period required by the Board may not exceed 30 days and may be for less than 30 days if the Board determines that a shorter period will reasonably serve the intent of this subsection.

(5) Unlawful Possession or Use. — It shall be unlawful for:

a. Any person to drink alcoholic beverages or to offer a drink to another person
   i. On the premises of a county or municipal liquor control store, or
   ii. Upon any premises used or occupied by a county or municipal alcoholic control board, or
   iii. On any public road, street, or highway.

b. Any person to make any public display of alcoholic beverages at any athletic contest.

c. Any person to possess or consume any alcoholic beverages or mixed beverages upon any of the premises designated under subdivisions (2), (3), (4) or (7) of this section, unless there is conspicuously displayed on the premises a valid permit or notice from the State Board of Alcoholic Control.

d. Any person, association, or corporation to permit any alcoholic beverages or mixed beverages to be possessed or consumed upon any premises not authorized by this Chapter.

e. Any person to possess or consume any alcoholic beverages or mixed beverages upon any premises where such possession or consumption is not authorized by law, or where the said person has been forbidden to possess or consume alcoholic beverages by the owner, operator, or person in charge of the premises.

f. Any person, firm, or corporation to refuse to surrender any permit or notice upon request of the State Board of Alcoholic Control, or falsely to display any such notice, or to display any notice not permitted by the State Board of Alcoholic Control, or to obtain any facsimile permit or notice from any person.

(6) Hours for Sale and Consumption. — It shall be unlawful for any mixed beverages to be sold on any premises having a mixed beverages permit between the hours of 1:00 A.M. and 7:00 A.M. and it shall be unlawful for any alcoholic beverages or mixed beverages to be consumed on any premises having a permit issued under the provisions of this section between the hours of 1:30 A.M. and 7:00 A.M. However, during the period commencing on the last Sunday of April of each year and ending on the last Sunday of October of each year mixed beverages may be sold until 2:00 A.M. and mixed beverages and alcoholic beverages may be consumed on the premises until 2:30 A.M. Subsequently, on Sundays, sales of mixed beverages and consumption of mixed beverages and alcoholic beverages may not resume until 1:00 P.M.

(7) Sale of Mixed Beverages. — The State Board of Alcoholic Control may issue a permit allowing the possession of more than four liters of alcoholic beverages and the on-premises sale of mixed beverages by an establishment meeting the requirements of subdivision (2) or (4) of this section, if the sale of mixed beverages has been authorized in the city, county, or township as that term is defined in G.S. 18A-51(c) within which the premises is located. When the sale of mixed beverages has been authorized in a city, permits may also be issued to qualified establishments that are outside the city but are within the same county and are on the property of an airport operated by the city or by an airport authority in which the city participates, provided the airport enplanes at least 150,000 passengers annually. If the premises issued the permit for the sale of mixed beverages also has a permit as a social establishment, the provisions of paragraphs c and d of subdivision (2) shall not apply to alcoholic beverages lawfully possessed on the premises for resale as mixed beverages.

(8) Prohibited Acts of Mixed Beverages Permit Holders. — It shall be unlawful for the holder of a permit for the sale of mixed beverages, or for any servant, agent or employee of the permit holder to:

a. Refill any alcoholic beverage container with any other intoxicating liquor for use on the licensed premises;

b. Transfer from one container to another any special label, seal or device required on containers of alcoholic beverages purchased for resale as mixed beverages;

c. Knowingly sell mixed beverages to any person who is intoxicated;

d. Sell, offer for sale, or possess for sale on the licensed premises any intoxicating liquor which the premises is not licensed to sell;

e. Knowingly permit the possession or consumption on the licensed premises of any intoxicating liquor for which no permit is held if a permit is required by law for the possession or consumption of that intoxicating liquor;

f. Sell mixed beverages, or allow mixed beverages to be consumed, on the licensed premises on any day or at any time when such sale or consumption is prohibited by law;

g. Allow on the licensed premises any disorderly conduct, breach of peace, or any lewd, immoral or improper entertainment, conduct or practices; or allow on the licensed premises any conduct or entertainment by nude performers or entertainers, or persons wearing transparent clothing, or performances by any male or female performers simulating sexual acts or sexual activities with any person, object, device or other paraphernalia.

(9) Sale or Consumption at Bingo Game or Raffle. — It is unlawful for any person to sell or consume alcoholic beverages, fortified wine, or mixed beverages in any room while a raffle or bingo game is being conducted in that room under G.S. 14-292.1. (1905, c. 498, ss. 6-8; Rev., ss. 3526, 3534; C.S., s. 3371; 1937, c. 49, ss. 12, 16, 22; c. 411; 1955, c. 999; 1967, c. 222, ss. 1, 8; c. 1256, s. 3; 1969, c. 1018; 1971, c. 872, s. 1; 1973, c. 1226; 1977, c. 176, s. 1; 1977, 2nd Sess., c. 1138, ss. 8-12, 18; 1979, c. 384, s. 3; c. 609, s. 2; c. 718; c. 893, s. 10.)

Editor's Note. —

Session Laws 1977, 2nd Sess., c. 1138, ss. 8-12, effective July 1, 1977, inserted "(except where authorized by law)" in the introductory paragraph, inserted "or mixed beverages" in paragraphs c, d and e of subdivision (5), substituted "subdivisions (2), (3), (4) or (7)" for "subdivisions (2), (3), or (4)" in paragraph c of subdivision (5), inserted "on the premises" following "displayed" and deleted "on said premises" following "notice" near the end of that paragraph, made minor changes in wording in paragraph e of subdivision (5), rewrote subdivision (6), and added subdivisions (7) and (8).

Session Laws 1977, 2nd Sess., c. 1138, s. 18, effective Jan. 1, 1978 (the effective date of Session Laws 1977, c. 176), amended subdivision (7) as added to this section by Session Laws 1977, c. 1138, s. 11, by substituting "four liters" for "one gallon" near the beginning of the subdivision.

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

The first 1979 amendment added the second sentence to subdivision (7).

The second 1979 amendment substituted "city, county, or township as that term is defined in G.S. 18A-51(c)" for "city or county" in the first sentence of subdivision (7).

The third 1979 amendment added the final paragraph to subdivision (2).

The fourth 1979 amendment, effective September 1, 1979, added subdivision (9).

Session Laws 1979, c. 893, s. 9, provides: "Nothing contained in this act shall be construed to render lawful any act committed prior to the effective date of this act [September 1, 1979] and unlawful at the time the act occurred; and nothing contained in this act shall be construed to affect any prosecution pending on the effective date of this act."

Session Laws 1979, c. 893, s. 8, contains a severability clause.

As the rest of the section was not changed by the amendments, only the introductory language and subdivisions (2), (5), (6), (7), (8) and (9) are set out.

Stated in Wheaton v. Hagan, 435 F. Supp. 1134 (M.D.N.C. 1977).

§ 18A-31. Permits for social establishments, restaurants, etc. — (a) Permits. — Any person, association, or corporation making application for a permit under this Article shall file said application and appropriate fee with the State Board of Alcoholic Control, and said Board shall have the exclusive authority, not inconsistent herewith, in issuing any permit, or in renewing, suspending, or revoking any temporary or annual permit. The additional provisions relating to said permits are as follows:

(1) Said Board may issue temporary permits where application in proper form has been received, with applicable fees, which shall be valid for 90 days, unless sooner suspended or revoked. No applicant or permittee shall be entitled to any hearing with reference to the issuance, suspension, or revocation of any temporary permit.

(2) Any temporary or annual permit shall be suspended or revoked by said Board, upon the suspension or revocation of any other permit or license by the State Board of Alcoholic Control, pursuant to any other section of this Chapter.

(3) All annual permits issued under this section shall be valid until May 1, 1968, unless sooner suspended or revoked, and thereafter all annual permits shall be valid for one year, renewable on May 1, 1968, and annually thereafter, unless sooner suspended or revoked. A permit for the possession of alcoholic beverages at a special occasion may be limited to a single 48-hour period by the State A.B.C. Board.

(4) Any person, association, or corporation shall promptly surrender any permit issued hereunder upon request of said Board.

(5) Before exercising any privilege granted hereunder, and immediately upon the receipt of any temporary or annual permit, said person, association, or corporation receiving the same shall keep conspicuously displayed said permit and in addition shall post a notice or notices, approved by said Board, designating the type of permit that is applicable to the premises. The Board shall approve and designate the type of signs, notices, and exhibits that may be displayed or used on any premises.

(6) All permits shall be the property of the State Board of Alcoholic Control, and no permit shall be transferable. Upon the termination of any business, or upon a change of ownership or control, all permits issued hereunder shall be immediately surrendered to said Board.

(7) All permits shall be issued for a designated location, a separate permit being required for each separate location of any business.

(8) The Board shall not arbitrarily refuse to issue a permit to a person, firm or corporation who complies with the provisions of this Chapter and the regulations adopted pursuant to this Chapter.

(b) Fees. — Applications for permits shall be accompanied by appropriate fees, payable to the State Board of Alcoholic Control, which shall not be refundable in case a permit is refused, suspended, or revoked. No additional fees or licenses shall be collected by any county or municipality under this section, and the fees received by the State Board of Alcoholic Control shall be deposited with the State Treasurer of North Carolina, as in the case of any other permit fees collected by said Board. No additional charge shall be imposed for any temporary permit. The schedule of fees for the original permit is as follows:

(1) Two hundred dollars ($200.00) for a social establishment as defined in G.S. 18A-30(2);

(2) Two hundred dollars ($200.00) for a commercial establishment as defined in G.S. 18A-30(3)c;

(3) One hundred dollars ($100.00) for a restaurant as defined in G.S. 18A-30(4) having a seating capacity of less than 50;

(4) Two hundred dollars ($200.00) for a restaurant as defined in G.S. 18A-30(4) having a seating capacity of 50 or more;

(5) Three hundred dollars ($300.00) for any establishment which obtains permits having two or more of the foregoing schedules for the same premises;

(5a) Twenty-five dollars ($25.00) for a permit for the possession of alcoholic beverages at a special occasion if the permit is not valid for more than 48 hours;

(6) Five hundred dollars ($500.00) for the sale of mixed beverages;

(7) The annual renewal fees for such permits shall be twenty-five percent (25%) of the original fee herein set forth except that the annual renewal fee for a permit for the sale of mixed beverages shall be fifty percent (50%) of the original fee.

(e) No permit may be issued for the purpose defined in G.S. 18A-30(4) in a county or city in which the sale of mixed beverages is authorized. (1971, c. 872, s. 1; 1977, c. 668, ss. 1, 2; 1977, 2nd Sess., c. 1138, ss. 13, 13.1; 1979, c. 683, s. 3.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1977, added present subdivision (6) of subsection (b) and rewrote former subdivision (6), which provided for annual renewal fees of twenty-five percent of the original permit, as present subdivision (7), and added subsection (e).

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

The 1979 amendment, in subdivision (8) of subsection (a), substituted "The Board shall not arbitrarily refuse to issue a permit to a person" for "Said Board shall not refuse the issuance of any permit to any person," and substituted "and the regulations adopted pursuant to this Chapter" for "and the issuance of a permit shall not be arbitrary in any case, but issuance of a permit shall be mandatory to any person, firm, or corporation complying with the provisions of this Chapter."

As the rest of the section was not changed by the amendment, only subsections (a), (b) and (e) are set out.

§ 18A-31.1. Permits to keep and use alcoholic beverages for culinary purposes. — (a) Notwithstanding the provisions of G.S. 18A-30, the State A.B.C. Board may grant to restaurants a permit which will enable them to keep in the kitchen of the restaurant, alcoholic beverages for culinary purposes only, provided each such restaurant regularly serves foods in which such beverages are used, and provided that these alcoholic beverages are obtained from a lawful source within the State. The State A.B.C. Board may adopt, amend or repeal such regulations as it may deem necessary to carry out the purpose of this section as provided in G.S. 18A-43, and shall require the permittee to retain all receipts and records of alcoholic beverages purchased with the quantities purchased not

exceeding a reasonable amount for culinary purpose intended herein. No more than 12 liters of alcoholic beverages may be possessed by any restaurant, and it shall be kept in the kitchen or storage area. Nothing contained in this section shall be construed to permit the sale of Irish coffee or any other beverage containing any spirituous liquor whatsoever.

(c) A restaurant with a mixed beverages permit may not at the same time hold a permit under this section, but any restaurant with a mixed beverages permit may use for culinary purposes any alcoholic beverage it has purchased for resale in mixed beverages. (1975, c. 680; 1977, c. 176, s. 5; 1979, c. 348, s. 1; c. 683, ss. 4, 10.)

Editor's Note. —

The 1979 first amendment substituted "Department of Human Resources" for "Commissioner for Health Services" in the language deleted by the second 1979 amendment.

The second 1979 amendment deleted "holding a Grade A rating from the Department of Human Resources" following "may grant to restaurants" near the beginning of the first sentence of subsection (a), and added subsection (c).

As subsection (b) was not changed by the amendments, it is not set out.

ARTICLE 4.

Malt Beverages and Wine.

Part 1. Retail Sales and Personal Use.

§ 18A-33. Sale and consumption during certain hours prohibited; sales by off-premises permittees.

(b) In addition to the restrictions on the sale of malt beverages and/or wines (fortified or unfortified) set out in this section, the governing bodies of all municipalities and counties in North Carolina shall have, and they are hereby vested with, full power and authority to regulate and prohibit the sale of malt beverages and/or wine (fortified or unfortified) from 1:00 P.M. on each Sunday until 7:00 A.M. on the following Monday. Provided, however, that municipalities and counties shall have no authority under this subsection to regulate or prohibit sales after 1:00 P.M. on Sundays by establishments having a permit issued under G.S. 18A-30(2), (4) and (7).

The power herein vested in governing bodies of municipalities shall be exclusive within the corporate limits of their respective municipalities, and the powers herein vested in the county commissioners of the various counties in North Carolina shall be exclusive in all portions of their respective counties not embraced in the corporate limits of municipalities therein.

(1979, c. 286, s. 3.)

Editor's Note. — The 1979 amendment substituted "G.S. 18A-30(2), (4) and (7)" for "G.S. 18A-30(2) and (4)" at the end of the second sentence of subsection (b).

As subsections (a) and (c) were not changed by the amendment, they are not set out.

§ 18A-35. Transportation and possession of malt beverages and unfortified wine; out-of-state purchases. — (a) Except as otherwise provided in this Chapter, the purchase, transportation, and possession of malt beverages and unfortified wine by individuals 18 years of age or older for their own use are permitted without restriction or regulation. Provided, the local government

units of the State shall have, and they are hereby vested with, full power and authority to regulate the consumption of malt beverages or unfortified wines on property owned or occupied by the local government unit.

(b) Whenever any person desires to purchase more than 20 liters but not exceeding 100 liters of unfortified wine at one time, he shall first obtain a purchase-transportation permit from the chairman of the local board, a member of the local board, or the general manager or supervisor of the local board of alcoholic control. No permit shall be issued by any authorized person to:

(1) Persons not of good character; or
(2) Persons not sufficiently identified, if unknown to the issuing person; or
(3) Persons known or shown to be alcoholics or bootleggers.

(c) The permit shall be signed by the person authorized to issue same and it shall authorize the purchaser named therein to purchase the quantity of unfortified wine therein indicated not to exceed 100 liters. The permit shall be issued by means of a printed form with at least two carbon copies of the same. On the face of the permit shall appear the following information:

(1) Name and address of purchaser;
(2) The name and location of the place where purchase is to be made;
(3) Date issued and expiration date;
(4) Destination;
(5) Signature of person issuing the permit;
(6) A statement that the permit is valid for only one purchase on the date shown and that the permit must accompany the merchandise while in transit and both the merchandise and the permit must be exhibited by purchaser to any law-enforcement officer upon request.

(d) The permit herein authorized shall be valid for only one purchase, and it shall expire at 9:30 P.M. of the date shown thereon. No purchase shall be made from any store except the store named on the permit. One copy of the permit shall be retained by the board issuing the same, one copy shall be delivered to the store from which the merchandise is purchased, and one copy shall be retained by the permittee. The permit shall authorize the permitee to transport unfortified wine from the place of purchase to the destination indicated thereon. It must accompany the merchandise during transit, and both the merchandise and the permit must be exhibited to any law-enforcement officer upon request.

(e) The chairman or any member of a local county or municipal board or the general manager or supervisor of any local alcoholic control board is authorized to issue purchase permits.

(f) Permits to be used shall be in the form substantially as follows:

ALCOHOLIC BEVERAGE CONTROL BOARD

. . . . . County
. . . . . , North Carolina
Date . . . . . , 19. . . .

PURCHASE-TRANSPORTATION PERMIT

(not to exceed 100 liters)

Name of Purchaser . . . . . .
Address . . . . . .
Name of Store . . . . . Address of Store . . . . . .
Destination . . . . . .
Route to Be Used . . . . . .

Signed . . . . . .
(Person authorized to issue)
Board Member

Note: This permit is valid for only one purchase, and it shall expire at 9:30 P.M. of the date shown above. Special Note: This permit must accompany the merchandise during transit. Both the merchandise and the permit must be exhibited to any law-enforcement officer upon request.

(g) A person may purchase legally outside of this State and bring into this State for his own personal use the same quantity of malt beverages or unfortified wine as may be legally purchased by said person within this State.

(h) It is unlawful for any person to sell or consume beer or unfortified wine in any room while a raffle or bingo game is being conducted in that room under G.S. 14-292.1. (1939, c. 158, s. 503; 1971, c. 872, s. 1; 1973, c. 1452, ss. 1-3; 1977, c. 176, ss. 2, 3; c. 693; 1979, c. 19, s. 2; c. 445, s. 4; c. 893, s. 11.)

Editor's Note. —

The first 1979 amendment substituted "9:30 P.M." for "6:00 P.M." where it appears in the first sentence of subsection (d) and in the note after the permit form in subsection (f).

The second 1979 amendment substituted "100 liters" for "80 liters" in the first sentence of subsections (b) and (c) and in the permit form in subsection (f).

The third 1979 amendment, effective September 1, 1979, added subsection (h).

Session Laws 1979, c. 893, s. 9, provides: "Nothing contained in this act shall be construed to render lawful any act committed prior to the effective date of this act [September 1, 1979] and unlawful at the time the act occurred; and nothing contained in this act shall be construed to affect any prosecution pending on the effective date of this act."

Session Laws 1979, c. 893, s. 8, contains a severability clause.

Part 1A. Commercial Wineries.

§ 18A-36.1. Commercial wineries.

(g) Notwithstanding G.S. 18A-52, G.S. 18A-57, or any other provision of this Chapter, a commercial winery with a valid unfortified winery or fortified winery permit under G.S. 18A-38(a)(1) is eligible to receive a permit under G.S. 18A-38(e)(2) for the off-premises sale at the winery of wine lawfully manufactured there. A winery receiving a permit for off-premises sale shall be subject to the same provisions as applied by this Chapter to all other retail off-premises wine permit holders and shall obtain the same licenses required for such permit holders by Chapter 105 of the General Statutes. (1973, c. 511, ss. 1, 2; 1975, c. 411, s. 6; 1979, c. 224.)

Editor's Note. —

The 1979 amendment added subsection (g).

As the rest of this section was not changed by the amendment, only subsection (g) is set out.

Part 2. Permits.

§ 18A-38. Power of State Board of Alcoholic Control to issue permits.

(e) Permits issued for the retail sale of unfortified wine shall be of two kinds:

(1) "On-premises" permits shall be issued only to bona fide hotels, cafeterias, cafes, and restaurants and shall authorize the permittees to sell at retail unfortified wine, either separate or mixed with nonalcoholic beverages, for consumption on the premises designated in the permit, and to sell unfortified wine in original containers for consumption off the premises. Notwithstanding any other provision of

this Chapter, or any local or special act or local election to the contrary, permits for the on-premises retail sale of unfortified wine may also be issued to restaurants, hotels and social establishments holding mixed beverage permits. Provided, no such permit shall be issued except to such hotels, cafeterias, cafes, and restaurants where prepared food is customarily sold and only to such as are permitted under the provisions of G.S. 105-62(a).

(2) "Off-premises" permits shall authorize the permittee to sell unfortified wine at retail for consumption off the premises designated in the permit, and all such sales shall be made in the immediate container in which the wine was purchased by the permittee.

(f) In any county or municipality in which the operation of alcoholic beverage control stores is authorized by law, it shall be legal to sell fortified or unfortified wines for consumption on the premises in hotels and restaurants and it shall be legal to sell said wines in drugstores and grocery stores for off-premises consumption. Notwithstanding any other provision of this Chapter, or any local or special act or local election to the contrary, permits for the on-premises retail sale of fortified wine may also be issued to restaurants, hotels and social establishments holding mixed beverage permits. Fortified wine sold for consumption on licensed premises may be sold either separate or mixed with nonalcoholic beverages. All sales of fortified wine shall be subject to the rules and regulations of the State A.B.C. Board.

(1979, c. 348, ss. 2, 3; c. 683, ss. 5, 6, 11, 12.)

Cross Reference. — For off-premises sale of wine by commercial winery, see § 18A-36.1.

Editor's Note. —

The first 1979 amendment substituted "Department of Human Resources" for "Commission for Health Services" in the language deleted by the second 1979 amendment in subdivision (e)(1) and subsection (f).

The second 1979 amendment, in subdivision (e)(1), deleted "which have a Grade A rating from the Department of Human Resources" following "hotels, cafeterias, cafes, and restaurants" near the beginning of the first sentence, and added the second sentence. The amendment also, in subsection (f), deleted "that have a Grade A rating from the Department of Human Resources" following "hotels and restaurants" near the middle of the first sentence, added the second sentence, and deleted the former last sentence, which read: "In the event a Grade A restaurant with an 'on premise' permit receives a Grade B sanitation rating, the establishment must stop selling 'on premise' wine after 30 days until the Grade A is restored."

As the rest of the section was not changed by the amendments, only subsections (e) and (f) are set out.

§ 18A-39. Application for permit; contents and fees. — (a) All resident bottlers, wineries, importers or manufacturers of malt beverages or wine (fortified or unfortified) and all resident wholesalers and retailers of malt beverages or wine (fortified or unfortified) shall file a written application for a permit with the State Board of Alcoholic Control, and in the application shall state under oath therein:

(1) The name and residence of the applicant and the length of his residence within the State of North Carolina;

(2) The particular place for which the license is desired, designating the same by street and number if practicable; if not, by such other apt description as definitely locates it; and the distance to the nearest church or public or private school from said place;

(3) The name of the owner of the premises upon which the business licensed is to be carried on, and, if the owner is not the applicant, that such applicant is the actual and bona fide lessee of the premises. However, if the permit is for the possession of alcoholic beverages at a special occasion and is valid for no more than 48 hours, in lieu of a statement that the applicant is a bona fide lessee the Board may require a written

statement from the owner or person in control of the premises authorizing the applicant's use of the premises for the special occasion;

(4) That the place or building in which it is proposed to do business conforms to all laws of health and fire regulations applicable thereto, and is a safe and proper place or building;

(5) That the applicant intends to carry on the business authorized by the permit for himself or under his immediate supervision and direction;

(6) That the applicant has been a bona fide resident of this State for a period of at least one year immediately preceding the date of filing his application and that he is not less than 21 years of age; provided, that no provision of this Chapter or any rule or regulation adopted pursuant thereto shall be construed to prohibit a person who is 18 years of age or older from being a manager, employee or other person in charge of any establishment which has a license and permit for on- or off-premises sales of malt beverages or wine (fortified or unfortified);

(7) The place of birth of applicant and, if a naturalized citizen, when and where naturalized;

(8) That the applicant has not been convicted of, or entered a plea of guilty or nolo contendere to, a felony within the past three years; that the applicant's citizenship has been restored by the court if he has been so deprived of it; that he has not, within the two years next preceding the filing of the application, been adjudged guilty of violating the prohibition or liquor laws, either state or federal; that he has not been convicted of or entered a plea of guilty or nolo contendere to a misdemeanor drug law violation. It shall be within the discretion of the Board, after making investigation, to determine whether any person who has ever been convicted of, or entered a plea of guilty or nolo contendere to, a felony shall be deemed a suitable person to receive and hold a malt beverage or wine (fortified or unfortified) permit;

(9) That the applicant has not during the three years next preceding the date of said application had any permit issuable hereunder, or any license issued to him pursuant to the laws of this State or any other state to sell intoxicating liquors of any kind, revoked;

(10) That the applicant is not the holder of a federal special tax liquor stamp;

(11) If the applicant is a firm, association, or partnership, the application shall state the matters required in subdivisions (6), (7), (8), and (9), with respect to each of the members thereof, and each of said members must meet all the requirements in said subdivisions provided;

(12) If the applicant is a corporation, organized or authorized to do business in this State, the application shall state the matters required in subdivisions (7), (8) and (9), with respect to each of the officers and directors thereof, and any stockholder owning more than twenty-five percent (25%) of the stock of such corporation, and the person or persons who shall conduct and manage the licensed premises for the corporation. Each of said persons must meet all the requirements in said subdivisions provided; provided, however, that the requirement as to residence shall not apply to said officers, directors, and stockholders of such corporation; however, such requirement shall apply to any such officer, director or stockholder, agent, or employee who is also the manager and in charge of the premises for which permit is applied, but the Board may, in its discretion, waive such requirement.

(1979, c. 286, s. 4.)

Editor's Note. —

The 1979 amendment, in subdivision (8) of subsection (a), deleted "or other crime involving moral turpitude" following "a felony" near the beginning of the first sentence, and added "that he has not been convicted of or entered a plea of guilty or nolo contendere to a misdemeanor drug law violation" at the end of the first sentence.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 18A-40. Permits prohibited.

(c) No retail malt beverage or wine (fortified or unfortified) on-premise permit, or mixed beverage permit, shall be issued for any establishment within 15 meters of a church or a public school unless the State Board of Alcoholic Control determines upon proper investigation and a hearing, if requested, that the establishment is a suitable one and that the failure to issue a permit will result in undue hardship. (1971, c. 872, s. 1; 1977, c. 176, s. 8; 1977, 2nd Sess., c. 1138, s. 14.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1977, inserted "or mixed beverage permit" near the beginning of subsection (c).

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

As subsections (a) and (b) were not changed by the amendment, they are not set out.

§ 18A-41. Permits for commercial transportation of malt beverages and wine (fortified and unfortified). — (a) Malt beverages and wine (fortified and unfortified) may be transported into, out of, or between points in this State by railroad companies, express companies, or steamboat companies engaged in public service as common carriers and having regularly established schedules of service upon condition that such companies shall keep accurate records of the character and volume of such shipments and the character and number of packages or containers and shall keep records open at all times for inspection by the State Board of Alcoholic Control and alcohol law enforcement agents, and upon condition that such common carriers shall make report of all shipments of such beverages into, out of, or between points in this State at such times and in such detail and form as may be required by the State Board of Alcoholic Control.

Malt beverages and wine (both fortified and unfortified) may be transported into, out of, or between points in this State over the public highways of this State by authorized motor vehicle carriers upon condition that every carrier intending to make use of the highways of this State shall, as a prerequisite thereto, register such intention with the State Board of Alcoholic Control in advance of such transportation, with notice of the kind and character of such products to be transported and its authorization from the appropriate regulatory authority. Upon the filing of such information, together with an agreement to comply with the provisions of this Chapter, the State Board of Alcoholic Control shall, without charge therefor, issue a numbered fleet permit to each such carrier, an exact copy of which shall be carried in the motor vehicle used in such transportation. Each permit copy shall bear the fleet carrier's certificate that it is a true and exact copy of the original permit issued by the Board. Every person transporting such products over any of the public highways of this State shall during the entire time he is so engaged have in his possession an invoice or bill of sale or other record evidence showing the true name and address of the person from whom he has received such beverages, the character and contents of containers, the number of bottles, cases, or liters of such shipment, and the true name and address of every person to whom deliveries are to be made. The person transporting such beverages shall, at the request of any alcohol law enforcement agents, produce and offer for inspection said invoice or bill of sale or record evidence. If said person fails to produce an invoice or bill of sale or record evidence, or if when produced, the document fails to clearly and accurately disclose said information, the failure shall be prima facie evidence of the violation of this Article. Every person engaged in transporting such beverages

over the public highways of this State shall keep accurate records of the character and volume of such shipments and the charaeter and number of packages or containers, and shall keep records open at all times for inspection by the State Board of Alcoholic Control and alcohol law enforcement agents. Such person shall make report of all shipments of such beverages into, out of, or between points in this State at such times and in such detail and form as may be required by the State Board of Alcoholic Control.

The provisions of this section as to transportation of malt beverages and wine (fortified and unfortified) by motor vehicles over the public highways of this State shall in like manner apply to the owner or operator of any boat using the waters of the State for such transportation, and all of the provisions of this section with respect to permits for such transportation and reports to the State Board of Alcoholic Control by the operators of motor vehicles on public highways shall in like manner apply to the owner or operator of any boat using the waters of this State.

(1979, c. 286, s. 5.)

Editor's Note. —

The 1979 amendment, in the second paragraph inserted "both" preceding "fortified and unfortified" in the parentheses near the beginning of the first sentence, substituted "authorized motor vehicle carriers" for "motor vehicles" and "carrier" for "person" and deleted "such" preceding "use of the highways" near the middle of the first sentence, and substituted "and its authorization from the appropriate regulatory authority" for "and the license and motor number of each motor vehicle intended to be used in such transportation" at the end of the first sentence. The amendment also, in the second paragraph, inserted "fleet" preceding "permit" and substituted "carrier, an exact copy of which shall be carried in the motor vehicle used in such transportation" for "owner or operator for each motor vehicle intended to be used for such transportation, which numbered permit shall be prominently displayed on the motor vehicle used in transporting malt beverages or wine (fortified and unfortified)" at the end of the second sentence, and added the third sentence.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 18A-43. Revocation or suspension of permit.

The sale of heroin is an unlawful purpose within the meaning of the term in subsection (a) of this section. Dove v. North Carolina Bd. of Alcoholic Control, 37 N.C. App. 605, 246 S.E.2d 584 (1978).

The law of this State is that all acts of employees are imputed to the permittee for the purposes of this section. Dove v. North Carolina Bd. of Alcoholic Control, 37 N.C. App. 605, 246 S.E.2d 584 (1978).

Co-permittees did, as a matter of law, knowingly allow the use of their premises for an unlawful purpose where their employee sold heroin on the premises, even though there was no evidence, other than the physical proximity of one co-permittee, that either co-permittee had actual knowledge of the transaction, since all acts of employees are imputed to the permittee for the purposes of this section. Dove v. North Carolina Bd. of Alcoholic Control, 37 N.C. App. 605, 246 S.E.2d 584 (1978).

ARTICLE 5.

Elections.

Part 1. A.B.C. Store Elections.

§ 18A-51. County elections as to alcoholic beverage control stores and sale of mixed beverages. — (a) No county alcoholic beverage control store shall be established, maintained or operated in any county of this State until and unless there has been held in the county an election as provided herein, and the election

shall be held under the same general laws, rules and regulations applicable to elections for county officers, insofar as practicable, provided that no markers shall be permitted. At this election there shall be submitted to the qualified voters of the county the question of setting up and operating in the county an alcoholic beverage control store, or stores, as herein provided. Those favoring the setting up and operation of alcoholic beverage control stores in the county shall mark in the voting square to the left of the words "for county alcoholic beverage control stores" printed on the ballot, and those opposed to setting up and operating alcoholic beverage control stores in the county shall mark in the voting square to the left of the words "against county alcoholic beverage control stores," printed on the same ballot. If a majority of the votes cast in such election shall be for county alcoholic beverage control stores, then an alcoholic beverage control store, or alcoholic beverage control stores, may be set up and operated in the county as herein provided. If a majority of the votes cast at the election are against county alcoholic beverage control stores, then no alcoholic beverage control store shall be set up or operated in the county under the provisions of this Chapter.

The election shall be called in the county by the board of elections of the county only upon the written request of the board of county commissioners therein, or upon a petition to the board of elections signed by a number of voters of the county equal to at least twenty percent (20%) of the number of registered voters of the county according to the registration figures as certified by the board of elections on the date the petition is presented to the county board of elections. In calling the special election, the county board of elections shall give at least 30 days' public notice of the election before the closing of the registration books for said election, and the registration books shall close at the same time as for a regular election. A new registration of voters for such special alcoholic beverage control election is not required, and all qualified electors who are properly registered prior to the registration for the special election, as well as those electors who register for the special alcoholic beverage control election, shall be entitled to vote in the election.

Unless otherwise specified in this section, the procedural requirements relating to the petition shall be as provided in G.S. 18A-52(b), (c), (d), and (e), except the question shall be "FOR" and "AGAINST" county alcoholic beverage control stores.

If any county, while operating any alcoholic beverage control store under the provisions of Chapters 418 or 493 of the Public Laws of 1935, or under the terms of this Chapter hereafter under the provisions of this Article holds an election and if at this election a majority of the votes are cast "against county alcoholic beverage control stores," then the alcoholic beverage control board in such county shall, within three months from the canvassing of the vote and the declaration of the result thereof, close the stores and shall thereafter cease to operate them. During this period, the county control board shall dispose of all alcoholic beverages on hand, all fixtures, and all other property in the hands and under the control of the county control board and shall convert the same into money and shall, after making a true and faithful accounting, turn all money in its hands over to the general funds of the county.

No election under this section shall be held on the day of any biennial election for county officers, or within 45 days of such an election. The date of any elections held under this section shall be fixed by the board of elections of the county wherein the election is held.

No other election shall be called and held in any of the counties in the State under the provisions of this section within three years from the holding of the last election under this section. In any county in which an election was held either under the provisions of Chapters 418 and 493 of the Public Laws of 1935, an election may be called under the provisions of this section, provided that no such election shall be called within three years of the holding of the last election.

Nothing herein contained shall be so construed as to require counties in which alcoholic beverage control stores have been established under Chapters 418 or 493 of the Public Laws of 1935 to have any further election in order to enable them to establish alcoholic beverage control stores. Counties in which alcoholic beverage control stores are now being operated under Chapters 418 or 493 of the Public Laws of 1935 shall from February 22, 1937, be operated under the terms of this Chapter.

(b) In any county or city where A.B.C. stores have been established, an election may be called on the question of whether the on-premises sale of mixed beverages should be allowed in social establishments and restaurants. The election shall be called by the board of elections of the county upon, and only upon, the written request of the governing body of the county or a city where A.B.C. stores have been established or upon petition of twenty percent (20%) of the voters registered in that county or city. The provisions of this section with regard to A.B.C. store elections shall apply to the mixed beverages elections except that the propositions to be voted upon shall be the following:

FOR the sale of mixed beverages in social establishments and restaurants.

AGAINST the sale of mixed beverages in social establishments and restaurants.

If a majority of the voters voting in the election vote for the sale of mixed beverages, the sale of mixed beverages shall be permitted in that county or city as provided in G.S. 18A-30. If a county or city has not yet authorized the establishment of A.B.C. stores, the election on the sale of mixed beverages may be called for the same time as the election on A.B.C. stores. The sale of mixed beverages may not continue at any time after a county or city has voted to no longer operate A.B.C. stores and the previously authorized stores have closed.

(c) In any township where A.B.C. stores have heretofore been established by petition pursuant to law, an election may be called on the question of whether the on-premises sale of mixed beverages should be allowed in social establishments and restaurants. The election shall be held by the county board of elections upon request of the county board of commissioners or upon petition of twenty percent (20%) of the registered voters of the township. Except as otherwise provided, the provisions of this section with regard to A.B.C. store elections shall apply to the mixed beverage election, and the question shall be as provided in subsection (b).

If the sale of mixed beverages is authorized in a township, the State Board of Alcoholic Control may issue the appropriate permits to qualified social establishments and restaurants located within the township. For purposes of this subsection, "township" includes any municipality in its entirety whose boundaries are totally or partially within the boundaries of the township. (1937, c. 49, ss. 25, 26; c. 431; 1971, c. 872, s. 1; 1973, c. 32; 1977, 2nd Sess., c. 1138, s. 15; 1979, c. 140, s. 2; c. 609, s. 1.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1977, designated the former provisions of this section as subsection (a) and added subsection (b).

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

The first 1979 amendment, effective Oct. 1, 1979, deleted "absentee ballots or" after "provided that no" in the first sentence of subsection (a).

The second 1979 amendment added subsection (c).

Part 2. Malt Beverage and Unfortified Wine Elections.

§ 18A-52. Malt beverage and unfortified wine elections in counties or municipalities.

(f) The election shall be held under the same general laws, rules and regulations, insofar as practicable, as provided for the election of county or municipal officers wherein the election is being held, but no markers shall be allowed. The opponents and proponents shall have the right to appoint two watchers to attend each voting place. The persons authorized to appoint watchers shall, three days before the election, submit in writing to the registrar of each precinct a signed list of the watchers appointed for that precinct. The persons appointed as watchers shall be registered voters of the precinct for which appointed. The registrar and judges for the precinct may for any good cause reject any appointee and require that another be appointed. Watchers shall do no electioneering at the voting place nor in any manner impede the voting process, interfere or communicate with or observe any voter in casting his ballot. Watchers shall be permitted in the voting place to make such observation and to take such notes as they may desire. No watcher shall enter the voting enclosure or render assistance to a voter. No new registration shall be required, and all qualified and registered voters shall be entitled to vote in the election.

(j) The ballot shall give the voter the opportunity to vote "For" or "Against" the question or questions presented.

If the election is to determine whether unfortified wine is to be sold, the ballot shall contain one or more of the following:

(1) FOR "on-premises" sales of unfortified wine by hotels and restaurants only and "off-premises" sales by other licensees. AGAINST "on-premises" sales of unfortified wine by hotels and restaurants only and "off-premises" sales by other licensees.

(2) FOR "off-premises" sales only of unfortified wine. AGAINST "off-premises" sales only of unfortified wine.

If the election is to determine whether malt beverages are to be sold, the ballot shall contain one or more of the following:

(1) FOR "on-premises" and "off-premises" sales of malt beverages, AGAINST "on-premises" and "off-premises" sales of malt beverages, or

(2) FOR "on-premises" sales only of malt beverages, AGAINST "on-premises" sales only of malt beverages, or

(3) FOR "off-premises" sales only of malt beverages, AGAINST "off-premises" sales only of malt beverages, or

(4) FOR "on-premises" sales of malt beverages by Grade A hotels and restaurants only and "off-premises" sales by other licensees, AGAINST "on-premises" sales of malt beverages by Grade A hotels and restaurants only and "off-premises" sales by other licensees.

Any one or more of the above questions shall, if requested in the petition, or by the governing body as authorized in subsections (b) and (g), be placed on the same ballot.

(1979, c. 140, s. 3; c. 683, s. 13.)

Local Modification. — Town of Lake Lure: 1979, c. 351.

Cross Reference. — For off-premises sale of wine by commercial winery, see § 18A-36.1.

Editor's Note. —

The first 1979 amendment, effective Oct. 1, 1979, deleted "absentee ballots or" preceding "markers" in the first sentence of subsection (f).

The second 1979 amendment deleted "Grade A" preceding "hotels" in two places in ballot proposition (1) for unfortified wine elections in subsection (j).

As the rest of the section was not changed by the amendments, only subsections (f) and (j) are set out.

ARTICLE 6.

Miscellaneous Provisions.

§ 18A-54. Power of Governor to prohibit all sales during an emergency.

(b) When the Governor finds that a state of emergency, as defined in G.S. 14-288.1, exists anywhere within the State, he may order the cessation of all sale or transfer, manufacture, or bottling of malt beverages or wine (fortified or unfortified) or mixed beverages in all or any portion of the State for the period of the emergency. His order shall be directed to the Chairman of the State Board of Alcoholic Control. The express authority granted by this section is not intended to limit any other authority, express or implied, to order cessation of these activities. (1969, c. 869, ss. 4, 5; 1971, c. 872, s. 1; 1977, c. 70, s. 21; 1977, 2nd Sess., c. 1138, s. 16.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1977, inserted "or mixed beverages" near the middle of subsection (b).

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 18A-56. Violation a misdemeanor.

Cross Reference. — For statute providing the maximum punishment for felonies, effective July 1, 1980, see § 14-1.1.

Amendment Effective July 1, 1980. — Session Laws 1979, c. 760, s. 5, effective July 1, 1980, will amend subsection (b) to read as follows:

"(b) The second or any subsequent conviction for violating G.S. 18A-5(a) is punishable as a Class I felony."

Session Laws 1979, c. 760, s. 6, provides: "This act shall become effective on July 1, 1980, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 18A-57. Local acts and local option.

(c) Notwithstanding subsections (a) and (b) of this section, the on-premises retail sale of fortified and unfortified wine is permitted under G.S. 18A-38 in restaurants, hotels and social establishments holding mixed beverage permits. (1923, c. 1, s. 28; C. S., s. 3411(bb); 1949, c. 974, s. 10; 1963, c. 426, s. 12; 1971, c. 872, s. 1; 1979, c. 683, s. 9.)

Cross Reference. — For off-premises sale of wine by commercial winery, see § 18A-36.1.

Editor's Note. — The 1979 amendment added subsection (c).

Session Laws 1979, c. 340, s. 1, provides: "All laws or clauses of laws of a private, local or special nature as well as all statutes or provisions of statutes which specifically refer to The University of North Carolina at Chapel Hill and its environs, including the Town of Chapel Hill and the County of Orange, for the purpose of prohibiting or otherwise regulating the sale, barter, transportation, importation, exportation, delivery, purchase or possession of intoxicating liquors there and which conflict with any provision of Chapter 18A of the General Statutes are hereby repealed."

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§§ 18A-59 to 18A-63: Reserved for future codification purposes.

ARTICLE 7.

Distilleries.

§ 18A-64. Distillation of spirituous liquors. — Notwithstanding any other provision of law, it shall be lawful for any person, firm, or corporation to engage in the business of distilling spirituous liquors in this State, pursuant to the provisions of this Article. Distilling includes blending, mixing, and purchasing for processing spirituous liquors of other manufacturers and distillers. (1979, c. 699, s. 4.)

Editor's Note. — Session Laws 1979, c. 699, s. 7, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 699, s. 6, provides: "Nothing in this act shall prohibit the levy of additional license, permit, or other taxes on distilleries operating under this act."

§ 18A-65. Permit and license required. — Spirituous liquors may be manufactured, bottled or sold in this State only after the person desiring to engage in that activity has acquired an appropriate permit from the State Board of Alcoholic Control as provided in this Article, and has secured the license or licenses required by Article 2C, Subchapter I, Chapter 105 of the General Statutes.

All permits shall be for a period of 10 years unless sooner revoked or suspended and shall expire on April 30 of each tenth year.

The State Board of Alcoholic Control shall arrange to computerize the files for permits as soon as feasible and once computerized shall retain a permanent number for each permit.

No permit issued under this section shall be transferable. When the ownership of any business to which a permit has been issued changes by merger, consolidation or otherwise, the permit shall automatically be terminated and returned immediately to the State Board of Alcoholic Control.

A change in ownership does not occur simply from the exchange or sale of stock unless a stockholder acquires more than twenty-five percent (25%) of the stock and that acquiring stockholder has not previously held twenty-five percent (25%) of the stock of the corporation. (1979, c. 699, s. 4.)

§ 18A-66. Power of State Board of Alcoholic Control to issue permits.—The State Board of Alcoholic Control shall be referred to herein as "the Board." The Board shall have the sole power, in its discretion, to determine the fitness and qualifications of an applicant for a permit to sell, manufacture, and bottle spirituous liquors. With the assistance of the Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety, the Board shall inquire into the character of the applicant and the location, general appearance, and type of place or business of the applicant. The Board, in addition to all powers now conferred upon it by law, is vested with additional powers to regulate the distillation and distribution of spirituous liquors as follows: A distillation permit authorizes the permitee to

(1) Manufacture, purchase, import, possess, and transport ingredients and equipment used in the distillation of spirituous liquors;

(2) Distill, sell, deliver, or ship spirituous liquors in accordance with the regulations of the Board in bottles or other permitted closed containers to persons authorized under the provisions of this Chapter;

(3) Sell spirituous liquors at wholesale to county, township, and municipal boards of alcoholic control within this State, and, subject to the laws of

other jurisdictions, sell spirituous liquors at wholesale or retail to private or governmental agencies or establishments of other states and nations. The State Board of Alcoholic Control may issue any regulations it deems necessary concerning wholesale sales within this State, including prohibitions against exclusive outlet sales and other practices not in the public interest. (1979, c. 699, s. 4.)

§ 18A-67. Application for permit; contents and fees. — (a) All resident distillers shall file a written application for a permit with the State Board of Alcoholic Control, and in the application shall state under oath therein:

(1) The name and residence of the applicant and the length of his residence within the State of North Carolina;

(2) The particular place for which the license is desired, designating the same by street and number if practicable; if not, by other description which definitely locates it;

(3) The name of the owner of the premises upon which the business licensed is to be carried on, and, if the owner is not the applicant, that the applicant is the actual and bona fide lessee of the premises;

(4) That the place or building in which it is proposed to do business conforms to all laws of health and fire regulations applicable thereto, and is a safe and proper place or building;

(5) That the applicant intends to carry on the business authorized by the permit for himself or under his immediate supervision and direction;

(6) That the applicant has been a bona fide resident of this State for a period of at least one year immediately preceding the date of filing his application and that he is not less than 21 years of age;

(7) The place of birth of applicant and, if a naturalized citizen, when and where naturalized;

(8) That the applicant has not been convicted of, or entered a plea of guilty or nolo contendere to, a felony or other crime involving moral turpitude within the past three years; that the applicant's citizenship has been restored by the court if he has been so deprived of it; that he has not, within the two years next preceding the filing of the application, been adjudged guilty of violating the prohibition or liquor laws, either State or federal. It shall be within the discretion of the Board, after making investigation, to determine whether any person who has ever been convicted of, or entered a plea of guilty or nolo contendere to, a felony shall be deemed a suitable person to receive and hold a distilling permit;

(9) That the applicant has not during the three years next preceding the date of the application had any permit issuable hereunder, or any license issued to him pursuant to the laws of this State or any other state to make or sell intoxicating liquors of any kind, revoked;

(10) If the applicant is a firm, association, or partnership, the application shall state the matters required in subdivisions (6), (7), (8), and (9), with respect to each of the members thereof, and each of those members must meet all the requirements in those subdivisions;

(11) If the applicant is a corporation, organized or authorized to do business in this State, the application shall state the matters required in subdivisions (7), (8) and (9), with respect to each of the officers and directors thereof, and any stockholder owning more then twenty-five percent (25%) of the stock of that corporation, and the person or persons who shall conduct and manage the licensed premises for the corporation. Each of those persons must meet all the requirements in those subdivisions; provided that the requirements as to residence shall not apply to the officers, directors, and stockholders of the corporation; however, the Board may apply that requirement to any officer, director

or stockholder, agent, or employee who is also the manager and in charge of the premises for which the permit is applied.

(b) The application must be verified by the affidavit of the applicant before a notary public or other person duly authorized by law to administer oaths. The foregoing provisions and requirements are prerequisites for the issuance of a permit; if any applicant fails to qualify under the same, or if any false statement is knowingly made in any application, the permit shall be refused. If a permit is granted on any application containing a false statement knowingly made, it shall be revoked and the applicant upon conviction shall be guilty of a misdemeanor. In addition to the information furnished in any application, the Director of the Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety shall make any additional and independent investigation of each applicant and of the place to be occupied, as deemed necessary or advisable.

(c) Every person applying to the State Board of Alcoholic Control for a permit to distill spirituous liquors under the provisions of this section shall pay an application fee at the time of application in the amount of one hundred dollars ($100.00), to be paid by check or money order made payable to the State Board of Alcoholic Control. These fees shall be deposited by the Board with the State Treasurer.

(d) The application of any person who fails to comply with the provisions of this section shall be refused, and if the permit has been granted, it shall be cancelled. (1979, c. 699, s. 4.)

§ 18A-68. Revocation or suspension of permit. — (a) If any permittee violates any of the provisions of this Chapter, or Chapter 105, or any rule or regulation promulgated under authority of either Chapter, or fails to superintend in person or through a manager the business for which the permit was issued, or allows the premises with respect to which the permit was issued to be used for any unlawful, disorderly, or immoral purpose, or knowingly employs in the sale or distribution of spirituous liquors any person who has been convicted of, or entered a plea of guilty or nolo contendere to a felony involving moral turpitude (federal or State) within the past three years, or adjudged guilty of violating the liquor or drug laws (federal or State) within two years, or leaves the licensed premises in charge of any person who has had a license or permit to make or sell intoxicating liquors of any kind revoked within the past two years, or otherwise fails to carry out in good faith the purposes of this Chapter, his permit may be revoked or suspended by the State Board of Alcoholic Control.

(b) The Board may refuse to issue a new permit or may suspend or revoke any permit issued by it if, in the discretion of the Board, the applicant or permittee is not a suitable person to hold the permit or the place occupied by the applicant or permittee is not a suitable place. In making its determination, the Board may consider the number already holding permits within the neighborhood, the recommendations of the governing body of the city or county in which the premises is located, reputation and criminal record of the applicant, and any other factors directly related to the suitability of the person and the premises.

(c) Whenever any license or permit which has been issued by the Secretary of Revenue or by the State Board of Alcoholic Control has been revoked, the State Board may refuse to issue a permit for the premises to any person for any period not to exceed six months after the revocation of that permit or license.

(d) The State A.B.C. Board may suspend or revoke any permit issued by it if the Board finds that the permittee has violated any provision of this Chapter or Chapter 105, or any rule or regulation of the State A.B.C. Board or the State Department of Revenue.

(e) Hearings before revocations or suspensions shall be conducted in accord with G.S. 18A-44. (1979, c. 699, s. 4.).

Chapter 19.

Offenses against Public Morals.

ARTICLE 1.

Abatement of Nuisances.

§ 19-1. What are nuisances under this Chapter.

Cross References. —

As to constitutionality of final judgment and order under this Article, see note to § 19-5.

Editor's Note. —

For article, "Regulating Obscenity Through the Power to Define and Abate Nuisances," see 14 Wake Forest L. Rev. 1 (1978).

For a survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

Constitutionality. — Even if § 19-5 unconstitutionally authorizes a judge to close a business after it has been declared a nuisance because of past exhibitions or sales of obscene material, a question not before the Supreme Court, § 19-5 is severable from the remaining provisions of chapter 19 and does not render chapter 19 unconstitutional on its face. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979).

Applied in State ex rel. Jacobs v. Sherard, 36 N.C. App. 60, 243 S.E.2d 184 (1978).

§ 19-1.1. Definitions.

Quoted in Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-1.2. Types of nuisances.

Burden on State to Prove Obscenity. — The State is required to prove all the elements of obscenity found in § 19-1.2(2) in a nuisance action, including proof that the material as a whole lacks "serious literary, artistic, political, educational, or scientific value." State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979).

In order for a bookstore to be a nuisance, the lewd publications must constitute a principal or substantial part of the stock in trade. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979).

Not every isolated obscene publication is a nuisance that can be abated under § 19-5. First it must be found that the book or magazine is one of many, such that all together they make up a large part of the bookstore's inventory. Once this initial determination is made, however, each individual obscene publication is a nuisance, and any and every one of them can be abated. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979).

Quoted in Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-2.1. Action for abatement; injunction.

Editor's Note. —

For a comment on taxpayers' actions, see 13 Wake Forest L. Rev. 397 (1977).

For article entitled, "The Common Law Powers of the Attorney General of North Carolina," see 9 N.C. Cent. L.J. 1 (1977).

Burden on State to Prove Obscenity. — The State is required to prove all the elements of obscenity found in § 19-1.2(2) in a nuisance action, including proof that the material as a whole lacks "serious literary, artistic, political, educational, or scientific value." State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979).

Quoted in State ex rel. Jacobs v. Sherard, 36 N.C. App. 60, 243 S.E.2d 184 (1978).

Stated in Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-2.2. Pleadings; jurisdiction; venue; application for preliminary injunction.

Stated in Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-2.3. Temporary order restraining removal of personal property from premises; service; punishment.

Cross Reference. — As to constitutionality of final order and judgment under this Article, see note to § 19-5.

The First Amendment right of the public to receive information is unaffected by the temporary restraining order, and the parallel right of the distributors to dispense the information is not discernibly chilled. Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

Temporary Restraining Order Does Not Operate as Prior Restraint. — The temporary restraining order authorized to be issued following the filing of the complaint and application for a preliminary injunction does not operate as a prior restraint on the distribution of particular publications and motion pictures presumptively protected by the First Amendment until an adversary hearing determines otherwise. Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

Construction of Inventory and Full Accounting Provisions of Section. — Reading this section as a whole, the apparent purpose of the inventory and accounting provision is to provide the factual basis for the determination of whether the business deals in obscene items as a "substantial" portion of its stock in trade, in the case of book stores, or "in the regular course of business," in the case of theaters. Such purpose could be accomplished by a full accounting that included no more than the date, item purchased, and amount paid. Because a statute may be declared unconstitutional on its face only if it offers no plausible constitutional interpretation, the court adopts this construction of the full accounting provision and not a construction which would require the recording of individual customers who purchase books or attend movies. Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

The requirement of an inventory by an officer does not require a warrantless search in contravention of the Fourth Amendment, since the clearest reading of the provision is that it directs an officer to enter an establishment that is open to the public and from that vantage point, make an inventory of items of personal property in plain view. Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-3. Priority of action; evidence.

Cited in State ex rel. Jacobs v. Sherard, 36 N.C. App. 60, 243 S.E.2d 184 (1978).

§ 19-4. Violation of injunction; punishment.

The plenary proceedings provided for in § 5A-15 apply to contempt actions following a chapter 19 injunction. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979).

§ 19-5. Content of final judgment and order.

Editor's Note. —

For a survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

Constitutionality. — Even if § 19-5 unconstitutionally authorizes a judge to close a business after it has been declared a nuisance because of past exhibitions or sales of obscene material, a question not before the Supreme Court, § 19-5 is severable from the remaining provisions of chapter 19 and does not render chapter 19 unconstitutional on its face. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979).

Ban on Future Dissemination of Unnamed Books and Movies Is Unconstitutional. —

The clear meaning of this section is that upon a finding that a book store or movie house is a nuisance because it substantially or regularly

trades in obscene materials, the superior court judge must enjoin the further distribution by the particular proprietor of any books or movies falling within the statutory definition of lewdness. Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

The blanket ban on the future dissemination of unnamed books and movies which is the effect of this section transgresses well established First Amendment standards, and thus is constitutionally infirm. Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

Restraining Order Was Not Unconstitutional Prior Restraint. — An order restraining defendants from selling or exhibiting obscene matter not actually before the court was not an unconstitutional prior restraint of their right of free speech in light of the unquestionably obscene nature of all of defendants' films and magazines before the court, the fact that the defendants were adequately warned of which materials they could not sell or exhibit by the specifically drawn order, and the procedural safeguards afforded the defendants. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979).

Sufficiency of Injunction. — Where the trial judge enjoined only the sale of "illegal lewd matter" which is correctly and completely defined in § 19-1.2(2), but did not specifically state that the sexual conduct being depicted be "patently offensive," this minor omission was not fatal to the injunction. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979).

Discretion of Judge in Formulating Abatement Order. — Once a business has been established as a nuisance, the judge is not required to enjoin the future distribution of any and all obscene matter as defined by § 19-1.1(2). The trial judge necessarily must be given some discretion in formulating his abatement order. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979).

If an abatement order does issue, the trial court has some discretion to define what conduct is prohibited as long as it falls within constitutional and statutory mandates, and he has the duty to specifically warn the defendant of the prohibited conduct. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979).

The legislature intended for judges to have some discretion in abating nuisances. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979).

Not every isolated obscene publication is a nuisance that can be abated under § 19-5. First it must be found that the book or magazine is one of many, such that all together they make up a large part of the bookstore's inventory. Once this initial determination is made, however, each individual obscene publication is a nuisance, and any and every one of them can be abated. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979).

The plenary proceedings provided for in § 5A-15 apply to contempt actions following a chapter 19 injunction. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979).

Cited in State ex rel. Jacobs v. Sherard, 36 N.C. App. 60, 243 S.E.2d 184 (1978).

§ 19-6. Civil penalty; forfeiture; accounting; lien as to expenses of abatement; invalidation of lease.

Quoted in Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-8.2. Right of entry.

Stated in Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-8.3. Severability.

Applied in Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

Cited in State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979).

ARTICLE 2.

Civil Remedy for Sales of Harmful Materials to Minors.

§ 19-9. Title.

Editor's Note. —
For article, "Regulating Obscenity Through the Power to Define and Abate Nuisances," see 14 Wake Forest L. Rev. 1 (1978).

Chapter 19A.

Protection of Animals.

Article 1.

Civil Remedy for Protection of Animals.

§ 19A-1. Definitions. — For the purposes of this Chapter [Article] the following definition of terms shall be applicable:

(2) The terms "cruelty" and "cruel treatment" shall be held to include every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted; but such term shall not be construed to include lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission, lawful activities sponsored by agencies conducting biomedical research or training, lawful activities for sport, the production of livestock or poultry, or the lawful destruction of any animal for the purpose of protecting such livestock or poultry.

(1979, c. 808, s. 2.)

Editor's Note. —

The 1979 amendment, effective July 1, 1979, inserted "and 'cruel treatment'" near the beginning of subdivision (2) and rewrote the part of subdivision (2) following the semicolon.

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (2) are set out.

§ 19A-3. Preliminary injunction. — Upon the filing of a verfied complaint in the district court in the county in which cruelty to an animal has allegedly occurred, the judge may, in his discretion, issue a preliminary injunction in accordance with the procedures set forth in G.S. 1A-1, Rule 65. Every such preliminary injunction, if the complainant so requests, may give the complainant the right to provide suitable care for the animal. If it appears on the face of the complaint that the condition giving rise to the cruel treatment of an animal requires the animal to be removed from its owner or other person who possesses it, then it shall be proper for the court in the preliminary injunction to allow the complainant to take possession of the animal. (1969, c. 831; 1971, c. 528, s. 10; 1979, c. 808, s. 3.)

Editor's Note. — The 1979 amendment, effective July 1, 1979, rewrote this section, which formerly provided for proceedings in the superior, rather than the district, court.

§ 19A-4. Permanent injunction. — In accordance with G.S. 1A-1, Rule 65, a district court judge in the county in which the original action was brought shall determine the merits of the action by trial without a jury, and upon hearing such evidence as may be presented, shall enter orders as he deems appropriate, including a permanent injunction or final determination of the animal's custody. (1969, c. 831; 1971, c. 528, s. 10; 1979, c. 808, s. 4.)

Editor's Note. — The 1979 amendment, effective July 1, 1979, substituted, at the beginning of the section, "In accordance with G.S. 1A-1, Rule 65, a district court judge" for "On the date specified in a preliminary injunction or temporary restraining order, which date shall not be later than 20 days from the issuance thereof, a resident superior court judge or a superior court judge holding a regular or special session of superior court." The amendment also deleted "the issuance of" preceding "a permanent injunction" near the end of the section and substituted "animal's custody" for "custody of the animal where appropriate" at the end of the section.

ARTICLE 2.

Protection of Black Bears.

§ 19A-10. Unlawful to buy, sell or enclose (except as provided) black bear.

Cross Reference. — As to captivity license required for wild bears, see § 113-272.5.

§§ 19A-15 to 19A-19: Reserved for future codification purposes.

ARTICLE 3.

Animal Welfare Act.

§ 19A-20. Title of Article. — This Article may be cited as the Animal Welfare Act. (1977, 2nd Sess., c. 1217, s. 1.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1217, s. 23, makes the act effective Jan. 1, 1979.

Session Laws 1977, 2nd Sess., c. 1217, s. 20, contains a severability clause.

§ 19A-21. Purposes. — The purposes of this Article are (i) to protect the owners of dogs and cats from the theft of such pets; (ii) to prevent the sale or use of stolen pets; (iii) to insure that animals, as items of commerce, are provided humane care and treatment by regulating the transportation, sale, purchase, housing, care, handling and treatment of such animals by persons or organizations engaged in transporting, buying, or selling them for such use; (iv) to insure that animals confined in pet shops, kennels, animal shelters and auction markets are provided humane care and treatment; (v) to prohibit the sale, trade or adoption of those animals which show physical signs of infection, communicable disease, or congenital abnormalities, unless veterinary care is assured subsequent to sale, trade or adoption. (1977, 2nd Sess., c. 1217, s. 2.)

§ 19A-22. Animal Welfare Section in Animal Health Division of Department of Agriculture created; Director. — There is hereby created within the Animal Health Division of the North Carolina Department of Agriculture, a new section thereof, to be known as the Animal Welfare Section of said division.

The Commissioner of Agriculture is hereby authorized to appoint a Director of said section whose duties and authority shall be determined by the Commissioner subject to the approval of the Board of Agriculture and subject to the provisions of this Article. (1977, 2nd Sess., c. 1217, s. 3.)

§ 19A-23. Definitions. — For the purposes of this Article, the following terms, when used in the Article or the rules and regulations or orders made pursuant thereto, shall be construed respectively to mean:

(1) "Adequate feed" means the provision at suitable intervals, not to exceed 24 hours, of a quantity of wholesome foodstuff suitable for the species and age, sufficient to maintain a reasonable level of nutrition in each animal. Such foodstuff shall be served in a sanitized receptacle, dish, or container.

(2) "Adequate water" means a constant access to a supply of clean, fresh, potable water provided in a sanitary manner or provided at suitable intervals for the species and not to exceed 24 hours at any interval.

(3) "Ambient temperature" means the temperature surrounding the animal.

(4) "Animal" means any domestic dog (Canis familiaris), domestic cat (Felis domestica).

(5) "Animal shelter" means a facility which is used to house or contain animals and which is owned, operated, or maintained by a duly incorporated humane society, animal welfare society, society for the prevention of cruelty to animals, or other nonprofit organization devoted to the welfare, protection and humane treatment of animals.

(5a) "Boarding kennel" means a facility or establishment which regularly offers to the public the service of boarding dogs or cats or both for a fee. Such a facility or establishment may, in addition to providing shelter, food and water, offer grooming or other services for dogs and/or cats.

(6) "Commissioner" means the Commissioner of Agriculture of the State of North Carolina.

(7) "Dealer" means any person who sells, exchanges, or donates, or offers to sell, exchange, or donate animals to another dealer, pet shop, or research facility; provided, however, that an individual who breeds and raises on his own premises no more than the offspring of five canine or feline females per year, unless bred and raised specifically for research purposes shall not be considered to be a dealer for the purposes of this Article.

(8) "Director" means the Director of the Animal Welfare Section of the Animal Health Division of the Department of Agriculture.
(9) "Euthanasia" means the human [humane] destruction of an animal accomplished by a method that involves rapid unconsciousness and immediate death or by a method that involves anesthesia, produced by an agent which causes painless loss of consciousness, and death during such loss of consciousness.
(10) "Housing facility" means any room, building, or area used to contain a primary enclosure or enclosures.
(11) "Person" means any individual, partnership, firm, joint-stock company, corporation, association, trust, estate, or other legal entity.
(12) "Pet shop" means a person or establishment that acquires for the purposes of resale animals bred by others whether as owner, agent, or on consignment, and that sells, trades or offers to sell or trade such animals to the general public at retail or wholesale.
(13) "Primary enclosure" means any structure used to immediately restrict an animal or animals to a limited amount of space, such as a room, pen, cage compartment or hutch.
(14) "Public auction" means any place or location where dogs or cats are sold at auction to the highest bidder regardless of whether such dogs or cats are offered as individuals, as a group, or by weight.
(15) "Research facility" means any place, laboratory, or institution at which scientific tests, experiments, or investigations involving the use of living animals are carried out, conducted, or attempted.
(16) "Sanitize" means to make physically clean and to remove and destroy to a practical minimum, agents injurious to health. (1977, 2nd Sess., c. 1217, s. 4; 1979, c. 734, s. 1.)

Editor's Note. The 1979 amendment added subdivision (5a).

§ 19A-24. Rules and regulations of Board of Agriculture. — The Board of Agriculture is hereby authorized and empowered to make such reasonable rules and regulations with regard to animal welfare as may be necessary to carry out the objectives and the intent of this Article. Such rules and regulations may include but are not limited to provisions relating to humane transportation to and from registered or licensed premises, records of purchase and sale, identification of animals handled, primary enclosures, housing facilities, sanitation, euthanasia, ambient temperatures, feeding, watering, and veterinary medical care. It may, after public hearing shall have been held and notification of such hearing having been given to all licensees, adopt in whole or in part those portions of the rules and regulations, promulgated by the Secretary of the United States Department of Agriculture pursuant to the provisions of the United States Public Law 89-544, commonly known as the Laboratory Animal Welfare Act, which are consistent with the intent and purpose of this Article. (1977, 2nd Sess., c. 1217, s. 5.)

§ 19A-25. Employees; investigations; right of entry. — For the enforcement of the provisions of this Article, the Director is authorized, subject to the approval of the Commissioner to appoint employees as are necessary in order to carry out and enforce the provisions of this Article, and to assign them interchangeably with other employees of the Animal Health Division. The Director shall cause the investigation of all reports of violations of the provisions of this Article, and the rules and regulations adopted pursuant to the provisions hereof; provided further, that if any person shall deny the Director or his representative admittance to his property, either person shall be entitled to

secure from any superior court judge a court order granting such admittance. (1977, 2nd Sess., c. 1217, s. 6.)

§ 19A-26. Certificate of registration required for animal shelter. — No person shall operate an animal shelter for more than one year subsequent to January 1, 1979, unless a certificate of registration for such animal shelter shall have been granted by the Director. Application for such certificate shall be made in the manner provided by the Director. No fee shall be required for such application or certificate. Certificates of registration shall be valid for a period of one year or until suspended or revoked and may be renewed for like periods upon application in the manner provided. (1977, 2nd Sess., c. 1217, s. 7.)

§ 19A-27. License required for operation of pet shop. — No person shall operate a pet shop as defined in this Article for more than six months subsequent to January 1, 1979, unless a license to operate such establishment shall have been granted by the Director. Application for such license shall be made in the manner provided by the Director. The license shall be for the fiscal year and the license fee shall be twenty-five dollars ($25.00) for each license period or part thereof beginning with the first day of the fiscal year. (1977, 2nd Sess., c. 1217, s. 8.)

§ 19A-28. License required for public auction or boarding kennel. — No person shall operate a public auction or a boarding kennel as defined in this Article for more than six months subsequent to January 1, 1979, unless a license to operate such establishment shall have been granted by the Director. Application for such license shall be made in the manner provided by the Director. The license period shall be the fiscal year and the license fee shall be twenty-five dollars ($25.00) for each license period or part thereof beginning with the first day of the fiscal year. (1977, 2nd Sess., c. 1217, s. 9.)

§ 19A-29. License required for dealer. — No person shall be a dealer as defined in this Article for more than six months after January 1, 1979, unless a license to deal shall have been granted by the Director to such person. Application for such license shall be in the manner provided by the Director. The license period shall be the fiscal year and the license fee shall be twenty-five dollars ($25.00) for each license period or part thereof, beginning with the first day of the fiscal year. (1977, 2nd Sess., c. 1217, s. 10.)

§ 19A-30. Refusal, suspension or revocation of certificate or license. — The Director may refuse to issue or renew or may suspend or revoke a certificate of registration for any animal shelter or a license for any public auction, kennel, pet shop, or dealer, if after an impartial investigation as provided in this Article he determines that any one or more of the following grounds apply:

(1) Material misstatement in the application for the original certificate of registration or license or in the application for any renewal under this Article;
(2) Willful disregard or violation of this Article or any regulations or rules issued pursuant thereto;
(3) Failure to provide adequate housing facilities and/or primary enclosures for the purposes of this Article, or if the feeding, watering, sanitizing and housing practices at the animal shelter, public auction, pet shop, or kennel are not consistent with the intent of this Article or with the intent of the rules and regulations which may be promulgated pursuant to the authority of this Article;
(4) Allowing one's license under this Article to be used by an unlicensed person;

(5) Conviction of any crime an essential element of which is misstatement, fraud, or dishonesty, or conviction of any felony;
(6) Making substantial misrepresentations or false promises of a character likely to influence, persuade, or induce in connection with the business of a public auction, commercial kennel, pet shop, or dealer;
(7) Pursuing a continued course of misrepresentation of or making false promises through advertising, salesmen, agents, or otherwise in connection with the business to be licensed;
(8) Failure to possess the necessary qualifications or to meet the requirements of this Article for the issuance or holding of a certificate of registration or license.

The Director shall, before refusing to issue or renew and before suspension or revocation of a certificate of registration or a license, give to the applicant or holder thereof a written notice containing a statement indicating in what respects the applicant or holder has failed to satisfy the requirements for the holding of a certificate of registration or a license. If a certificate of registration or a license is suspended or revoked under the provisions hereof, the holder shall have five days from such suspension or revocation to surrender all certificates of registration or licenses issued thereunder to the Director or his authorized representative.

Any person to whom a certificate of registration or a license is denied, suspended, or revoked by the Director, may appeal such denial, suspension, or revocation by filing within five days in writing with the Director a request for a public hearing before the Board of Agriculture or its designated hearing officer, and such hearing shall be held within 10 days and shall be conducted in accordance with the provisions of G.S. 19A-32.

Any licensee whose license is revoked under the provisions of this Article shall not be eligible to apply for a new license hereunder until one year has elapsed from the date of the order revoking said license or if an appeal is taken from said order of revocation, one year from the date of the order or final judgment sustaining said revocation. Any person who has been an officer, agent, or employee of a licensee whose license has been revoked or suspended and who is responsible for or participated in the violation upon which the order of suspension or revocation was based, shall not be licensed within the period during which the order of suspension or revocation is in effect. (1977, 2nd Sess., c. 1217, s. 11.)

§ 19A-31. License not transferable; change in management, etc., of business or operation. — A license is not transferable. When there is a transfer of ownership, management, or operation of a business of a licensee hereunder, the new owner, manager, or operator, as the case may be, whether it be an individual, firm, partnership, corporation, or other entity shall have 10 days from such sale or transfer to secure a new license from the Director to operate said business. A licensee shall promptly notify the Director of any change in the name, address, management, or substantial control of his business or operation. (1977, 2nd Sess., c. 1217, s. 12.)

§ 19A-32. Proceedings under Article; appeals. — Proceedings under this Article shall be taken by the Board of Agriculture or its delegated hearing officer when accusation is made in writing and under oath. Upon receiving such accusation, the Board of Agriculture, or its hearing officer, shall serve notice by registered mail or personally of the time and place of the hearing, and a copy of the charges upon the accused at least 15 days before the date of the hearing. The Board of Agriculture, or its hearing officer, for sufficient cause in its discretion, may postpone or continue said hearing from time to time, or if after proper notice no appearance is made by the accused, the Board or the hearing

officer may enter judgment at the time of hearing as prescribed herein, either by suspending or revoking the license of the accused or dismissing the accusation. Both the Board of Agriculture, or hearing officer, and the accused may have the benefit of counsel and the right to cross-examine witnesses, to take depositions, and to compel attendance of witnesses as in cases by subpoena issued by the Director under the seal of the Board of Agriculture, and in the name of the State of North Carolina. The testimony of all witnesses at any hearing before the Board of Agriculture, or hearing officer, shall be under oath or affirmation. The Director is authorized to reimburse witnesses for their time and travel, and to award expert witness fees to witnesses so qualified. The record of all hearings and judgments shall be kept by the Secretary of the Board of Agriculture, and in the event of suspension or revocation of certificate of registration or license, the Secretary shall within 10 days transmit a certified copy of said judgment to the clerk of the superior court of the county of the residence of the accused or his registered agent, and the clerk shall file said judgment in the judgment docket of said county.

Any person may appeal to the Superior Court of Wake County the denial of a certificate of registration or license, and any holder of a certificate of registration or licensee may appeal to the Superior Court of Wake County the failure to renew any certificate of registration or license or the revocation or suspension of the license issued under the provisions of this Article, and such appeals shall be made pursuant to the provisions of Chapter 150A of the General Statutes. (1977, 2nd Sess., c. 1217, s. 13.)

§ 19A-33. Penalty for operation of pet shop, kennel or auction without license. — Operation of a pet shop, kennel, or public auction without a currently valid license shall constitute a misdemeanor subject to a penalty of not less than five dollars ($5.00) nor more than twenty-five dollars ($25.00), and each day of operation shall constitute a separate offense. (1977, 2nd Sess., c. 1217, s. 14.)

§ 19A-34. Penalty for acting as dealer without license; disposition of animals in custody of unlicensed dealer. — Acting as a dealer in animals as defined in this Article without a currently valid dealer's license shall constitute a misdemeanor subject to a penalty of not less than five dollars ($5.00) nor more than twenty-five dollars ($25.00), or imprisonment for a period not to exceed six months, or both fine and imprisonment. Continued illegal operation after conviction shall constitute a separate offense. Animals found in possession or custody of an unlicensed dealer shall be subject to immediate seizure and impoundment and upon conviction of such unlicensed dealer shall become subject to sale or euthanasia in the discretion of the Director. (1977, 2nd Sess., c. 1217, s. 15.)

§ 19A-35. Penalty for failure to adequately care for animals; disposition of animals. — Failure of any person licensed or registered under this Article to adequately house, feed, and water animals in his possession or custody shall constitute a misdemeanor, and such person shall be subject to a fine of not less than five dollars ($5.00) per animal or more than a total of one thousand dollars ($1,000). Such animals shall be subject to seizure and impoundment and upon conviction may be sold or euthanized at the discretion of the Director and such failure shall also constitute grounds for revocation of license after public hearing. The Director is hereby authorized to disburse State funds in such amount as in his discretion is necessary to provide for the welfare of the animals until either sold or euthanized and any fine levied in connection with this section shall be applied toward reimbursement of such State funds as the Director shall have expended. (1977, 2nd Sess., c. 1217, s. 16.)

§ 19A-36. Penalty for violation of Article by dog warden. — Violation of any provision of this Article which relates to the seizing, impoundment, and custody of an animal by a dog warden shall constitute a misdemeanor and the person convicted thereof shall be subject to a fine of not less than fifty dollars ($50.00) and not more than one hundred dollars ($100.00), and each animal handled in violation shall constitute a separate offense. (1977, 2nd Sess., c. 1217, s. 17.)

§ 19A-37. Application of Article. — This Article shall not apply to a place or establishment which is operated under the immediate supervision of a duly licensed veterinarian as a hospital where animals are harbored, boarded, and cared for incidental to the treatment, prevention, or alleviation of disease processes during the routine practice of the profession of veterinary medicine. This Article shall not apply to any dealer, pet shop, public auction, commercial kennel or research facility during the period such dealer or research facility is in the possession of a valid license or registration granted by the Secretary of Agriculture pursuant to the provisions of United States Public Law 89-544. This Article shall not apply to any individual who occasionally boards an animal on a noncommercial basis, although such individual may receive nominal sums to cover the cost of such boarding. (1977, 2nd Sess., c. 1217, s. 18.)

§ 19A-38. Use of license fees. — All license fees collected shall be used in enforcing and administering this Article. (1977, 2nd Sess., c. 1217, s. 19.)

§ 19A-39. Article inapplicable to establishments for training hunting dogs. — Nothing in this Article shall apply to those kennels or establishments operated primarily for the purpose of boarding or training hunting dogs. (1977, 2nd Sess., c. 1217, s. 21; 1979, c. 734, s. 2.)

Editor's Note. — The 1979 amendment inserted "boarding or."

§§ 19A-40 to 19A-44: Reserved for future codification purposes.

ARTICLE 4.

Animal Cruelty Investigators.

§ 19A-45. Appointment of animal cruelty investigators; term of office; removal; badge; oath; bond. — (a) The board of county commissioners is authorized to appoint one or more animal cruelty investigators to serve without any compensation or other employee benefits in his county. In making these appointments, the board may consider persons nominated by any society incorporated under North Carolina law for the prevention of cruelty to animals. Prior to making any such appointment, the board of county commissioners is authorized to enter into an agreement whereby any necessary expenses of caring for seized animals not collectable pursuant to G.S. 19A-7 may be paid by the animal cruelty investigator or by any society incorporated under North Carolina law for the prevention of cruelty to animals that is willing to bear such expense.

(b) Animal cruelty investigators shall serve a one-year term subject to removal for cause by the board of county commissioners. Animal cruelty investigators shall, while in the performance of their official duties, wear in plain view a badge of a design approved by the board identifying them as animal cruelty investigators, and provided at no cost to the county.

(c) Animal cruelty investigators shall take and subscribe the oath of office required of public officials. The oath shall be filed with the clerk of superior court. Animal cruelty investigators shall not be required to post any bond.

(d) Upon approval by the board of county commissioners, the animal cruelty investigator or investigators may be reimbursed for all necessary and actual expenses, to be paid by the county. (1979, c. 808, s. 1.)

Editor's Note. — Session Laws 1979, c. 808, s. 6, makes the act effective July 1, 1979.

§ 19A-46. Powers; magistrate's order; execution of order; petition; notice to owner. — (a) Whenever any animal is being cruelly treated as defined in G.S. 19A-1(2), an animal cruelty investigator may file with a magistrate a sworn complaint requesting an order allowing the investigator to provide suitable care for and take immediate custody of the animal. The magistrate shall issue the order only when he finds probable cause to believe that the animal is being cruelly treated and that it is necessary for the investigator to immediately take custody of it. Any magistrate's order issued under this section shall be valid for only 24 hours after its issuance. After he executes the order, the animal cruelty investigator shall return it with a written inventory of the animals seized to the clerk of court in the county where the order was issued.

(b) The animal cruelty investigator may request a law enforcement officer or animal control officer to accompany him to help him seize the animal. An investigator may forcibly enter any premises or vehicle when necessary to execute the order only if he reasonably believes that the premises or vehicle is unoccupied by any person and that the animal is on the premises or in the vehicle. Forcible entry shall be used only when the animal cruelty investigator is accompanied by a law enforcement officer. In any case, he must give notice of his identity and purpose to anyone who may be present before entering said premises. Forcible entry shall only be used during the daylight hours.

(c) When he has taken custody of such an animal, the animal cruelty investigator shall file a complaint pursuant to Article 1 of this Chapter as soon as possible. When he seizes the animal, he shall leave with the owner, if known, or affixed to the premises or vehicle a copy of the magistrate's order and a written notice of a description of the animal, the place where the animal will be taken, the reason for taking the animal, and the investigator's intent to file a complaint in district court requesting custody of the animal pursuant to Article 1 of this Chapter.

(d) Notwithstanding the provisions of G.S. 7A-305(c), any person who commences a proceeding under this Article or Article 1 of this Chapter shall not be required to pay any court costs or fees prior to a final judicial determination as provided in G.S. 19A-4, at which time those costs shall be paid pursuant to the provisions of G.S. 6-18.

(e) Any judicial order authorizing forcible entry shall be issued by a district court judge. (1979, c. 808, s. 1.)

§ 19A-47. Care of seized animals. — The investigator must take any animal he seizes directly to some safe and secure place and provide suitable care for it. The necessary expenses of caring for seized animals, including necessary veterinary care, shall be a charge against the animal's owner and a lien on the animal to be enforced as provided by G.S. 44A-4. (1979, c. 808, s. 1.)

§ 19A-48. Interference unlawful. — It shall be a misdemeanor punishable by a fine of up to two hundred dollars ($200.00) or not more than ninety days imprisonment, or both, to interfere with an animal cruelty investigator in the performance of his official duties. (1979, c. 808, s. 1.)

§ 19A-49. Educational requirements. — Each animal cruelty investigator at his own expense must attend annually a course of at least six hours instruction offered by the North Carolina Humane Federation or some other agency. The course shall be designed to give the investigator expertise in the investigation of complaints relating to the care and treatment of animals. Failure to attend a course approved by the board of county commissioners shall be cause for removal from office. (1979, c. 808, s. 1.)

Chapter 20.

Motor Vehicles.

Article 1.

Division of Motor Vehicles.

Sec.

Article 1B.

Reciprocal Provisions as to Arrest of Nonresidents.

Article 2.

Uniform Driver's License Act.

Article 2A.

Afflicted, Disabled or Handicapped Persons.

Article 2B.

Special Identification Cards for Nonoperators.

Sec.

Article 3.

Motor Vehicle Act of 1937.

ARTICLE 1.

Division of Motor Vehicles.

§ 20-1. Division of Motor Vehicles of the Department of Transportation; powers and duties.

Cited in State v. Wyrick, 35 N.C. App. 352, 241 S.E.2d 355 (1978).

§ 20-4.01. Definitions. — Unless the context otherwise requires, the following words and phrases, for the purpose of this Chapter, shall have the following meanings:

(21a) Mo-ped. — A type of passenger vehicle as defined in G.S. 20-4.01(27).

(23) Motor Vehicle. — Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. This shall not include mo-peds as defined in G.S. 20-4.01(27)d1.

(27) Passenger Vehicles. —

a. Excursion passenger vehicles. — Vehicles transporting persons on sight-seeing or travel tours.

b. For-hire passenger vehicles. — Vehicles transporting persons for compensation. This classification shall not include vehicles operated as ambulances; vehicles (except those with wheelbases of 140 inches or more) operated by the owner where the cost of operation is shared by the passengers; vehicles (except those with wheelbases of 140 inches or more) operated by any bona fide employee for the transportation of other bona fide employees and himself to and from the place(s) of their regular employment and operated for compensation only for one round trip per day to and from the work location(s); vehicles transporting students for the public school system under contract with the State Board of Education; or vehicles leased to the United States of America or any of its agencies on a nonprofit basis.

c. Common carriers of passengers. — Vehicles operated under a franchise certificate issued by the Utilities Commission for operation on the highways of this State between fixed termini or over a regular route for the transportation of persons or property for compensation.

d. Motorcycles. — Vehicles having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with

the ground, including motor scooters and motor-driven bicycles, but excluding tractors and utility vehicles equipped with an additional form of device designed to transport property, three-wheeled vehicles while being used by law-enforcement agencies and mo-peds as defined in subdivision d1 of this subsection.

d1. Mo-ped. — Vehicles having two or three wheels and operable pedals and equipped with a motor which does not exceed 50 cubic centimeters piston displacement and cannot propel the vehicle at a speed greater than 20 miles per hour on a level surface.

e. U-drive-it passenger vehicles. — Vehicles rented or leased to be operated by the lessee. This shall not include vehicles of nine-passenger capacity or less which are leased for a term of one year or more to the same person or vehicles leased or rented to public school authorities for driver-training instruction.

f. Ambulances. — Vehicles equipped for transporting wounded, injured, or sick persons.

g. Private passenger vehicles. — All other passenger vehicles not included in the above definitions.

(31) Property-Hauling Vehicles. —

a. Exempt for-hire vehicles. — Vehicles used for the transportation of property for hire but not licensed as common carriers or contract carriers of property under franchise certificates or permits issued by the Utilities Commission or by the Interstate Commerce Commission; provided, that the term "for hire" shall include every arrangement by which the owner of a vehicle uses, or permits such vehicle to be used, for the transportation of the property of another for compensation, subject to the following exemptions:

1. The transportation of farm crops or products, including logs, bark, pulp, and tannic acid wood delivered from farms and forest to the first or primary market, and the transportation of wood chips from the place where wood has been converted into chips to their first or primary market.
2. The transportation of perishable foods which are still owned by the grower while being delivered to the first or primary market by an operator who has not more than one truck, truck-tractor, or trailer in a for-hire operation.
3. The transportation of merchandise hauled for neighborhood farmers incidentally and not as a regular business in going to and from farms and primary markets.
4. The transportation of T.V.A. or A.A.A. phosphate and/or agricultural limestone in bulk which is furnished as a grant of aid under the United States Agricultural Adjustment Administration.
5. The transportation of fuel for the exclusive use of the public schools of the State.
6. Vehicles whose sole operation in carrying the property of others is limited to the transportation of the United States mail pursuant to a contract, or the extension or renewal of such contract.
7. Vehicles leased for a term of one year or more to the same person when used exclusively by such person in transporting his own property.

b. Common carrier of property vehicles. — Vehicles used for the transportation of property certified by the Utilities Commission or the Interstate Commerce Commission as common carriers.

c. Private hauler vehicles. — Vehicles used for the transportation of property not falling within one of the above-defined classifications; provided, self-propelled vehicles equipped with permanent living and sleeping facilities used for camping activities shall be classified as private passenger vehicles.

d. Semitrailers. — Vehicles without motive power designed for carrying property or persons and for being drawn by a motor vehicle, and so constructed that part of their weight or their load rests upon or is carried by the pulling vehicle.

e. Trailers. — Vehicles without motive power designed for carrying property or persons wholly on their own structure and to be drawn by a motor vehicle, including "pole trailers" or a pair of wheels used primarily to balance a load rather than for purposes of transportation.

f. Contract carrier of property vehicles. — Vehicles used for the transportation of property under a franchise permit of a regulated contract carrier issued by the Utilities Commission or the Interstate Commerce Commission.

(32) Public Vehicular Area. — Any drive, driveway, road, roadway, street, or alley upon the grounds and premises of any public or private hospital, college, university, school, orphanage, church, or any of the institutions maintained and supported by the State of North Carolina, or any of its subdivisions or upon the grounds and premises of any service station, drive-in theater, supermarket, store, restaurant or office building, or any other business, residential, or municipal establishment providing parking space for customers, patrons, or the public or any drive, driveway, road, roadway, street, alley or parking lot upon any property owned by the United States and subject to the jurisdiction of the State of North Carolina (the inclusion of property owned by the United States in this definition shall not limit assimilation of North Carolina law where applicable under the provision of Title 18, United States Code, section 13). The term "public vehicular area" shall also include any street opened to vehicular traffic within a subdivision which has been offered for dedication to the public by the filing of a map, plat or written instrument in the office of the Register of Deeds; provided however, a public authority (i) has not accepted the dedication of the street, and (ii) a public authority has not assumed control over the street.

(1979, c. 39; c. 423, s. 1; c. 574, ss. 1-4; c. 680.)

Editor's Note. —

Session Laws 1979, c. 39, deleted "exclusively" following "facilities used" near the end of paragraph c of subdivision (31).

Session Laws 1979, c. 423, s. 1, added to subdivision (32) the provisions as to property owned by the United States and subject to the jurisdiction of the State of North Carolina.

Session Laws 1979, c. 574, ss. 1-4, effective July 1, 1979, added subdivision (21a), substituted "mo-peds as defined in G.S. 20-4.01(27)d1" for "bicycles with helper motors rated less than one brake horsepower which produce only ordinary pedaling speeds up to a maximum of 20 miles per hour" in the second sentence of subdivision (23), substituted "mo-peds as defined in subdivision d1 of this subsection" for "bicycles with helper motors rated less than one brake horsepower which produce only ordinary pedaling speeds up to a maximum of 20 miles per hour" in paragraph d of subdivision (27), and added paragraph d1 of subdivision (27).

Session Laws 1979, c. 680, effective July 1, 1979, added the second sentence of subdivision (32).

Only the introductory language and the subdivisions changed by the amendments are set out.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 1, effective Jan. 1, 1981, will amend this section by substituting "drivers' licenses" for "operators' and chauffeurs' licenses" in subdivision (2) and deleting subdivision (3).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the

provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

Construction of Subdivision (13). — The definition of "highway" in subdivision (13) is to be construed so as to give its terms their plain and ordinary meaning. Smith v. Powell, 293 N.C. 342, 238 S.E.2d 137 (1977).

The legislature has provided that, unless the context requires otherwise, the word "highway" is to be given the same connotation in all of the provisions of Chapter 20, whether they be penal, remedial or otherwise. Thus, the well known principles of statutory construction that a penal statute is to be strictly construed and a statute designed to promote safety is to be liberally construed have no application. Smith v. Powell, 293 N.C. 342, 238 S.E.2d 137 (1977).

"Highway" Distinguished from Roadway. — The definitions of "highway" and "roadway," considered together, show that the legislature in defining "highway" intended to make it clear that the entire "width" between the right-of-way lines is included in a "highway" as distinguished from a "roadway." Smith v. Powell, 293 N.C. 342, 238 S.E.2d 137 (1977).

Definition of "Highway" Is Concerned with Width, Not Depth. — While it is true that a "highway" or a "street" is not limited to its surface so far as the right of the State to use, maintain and protect it from damage and private use are concerned, and in this sense, it includes not only the entire thickness of the pavement and the prepared base upon which it rests but also so much of the depth as may not unfairly be used as streets are used for the laying therein of drainage systems and conduits for sewer, water and other services, nevertheless, the primary concern of the legislature in defining "highway" as used in Chapter 20 was with the "width," not the depth. "Width" means "the lineal extent of a thing from side to side." Smith v. Powell, 293 N.C. 342, 238 S.E.2d 137 (1977).

Area beneath Highway Bridge Not "Highway". — A petitioner who drove a motor vehicle only within the limits of the area beneath a highway bridge did not drive on a "highway" as that term is used in § 20-16.2. Smith v. Powell, 293 N.C. 342, 238 S.E.2d 137 (1977).

ARTICLE 1A.

Reciprocity Agreements as to Registration and Licensing.

§ 20-4.2. Definitions.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 470, s. 2, effective Jan. 1, 1981, will delete "interstate" after "operated" in subdivision (1).

ARTICLE 1B.

Reciprocal Provisions as to Arrest of Nonresidents.

§ 20-4.18. Definitions.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 2, will amend subdivision (3) to read as follows:

"(3) Repealed by Session Laws 1979, c. 667, s. 2, effective January 1, 1981."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-4.20. Division to transmit report to reciprocating state; suspension of license for noncompliance with citation issued by reciprocating state.

(c) A copy of any suspension order issued hereunder may be furnished to the licensing authority of the reciprocating state.

(1979, c. 104.)

Editor's Note. — The 1979 amendment, effective October 1, 1979, substituted "may" for "shall" in subsection (c). As the rest of the section was not changed by the amendment, only subsection (c) is set out.

ARTICLE 2.

Uniform Driver's License Act.

§ 20-7. Operators' and chauffeurs' licenses; expiration; examinations; fees.

(a1) No operator's or chauffeur's license issued on or after October 1, 1979, shall authorize the licensee to operate a motorcycle unless the license has been appropriately endorsed by the Division to indicate that the licensee has passed special road and written (or oral) tests demonstrating competence to operate a motorcycle. Any person licensed prior to January 1, 1978, who has operated a motorcycle for at least two years prior to that date, will be exempt from the provisions of this subsection upon filing with the Division of Motor Vehicles an affidavit attesting to said two years' experience. Nothing contained in this subsection shall be construed to require a mo-ped operator to have a driver's license.

(d) The Division shall cause each person who has heretofore been issued an operator's license to be examined or reexamined, as the case may be, to determine whether or not such person is physically and mentally capable of safely operating motor vehicles over the highways of the State. Those persons found, as a result of such examination or reexamination, to be capable of safely operating motor vehicles over the highways of the State shall be reissued operators' licenses; and those persons found to be incapable of safely operating motor vehicles over the highways of the State shall not be reissued operators' licenses. The examination required by this subsection may include such road tests, oral and in the case of literate applicants written tests, and tests of vision, as the Division may require and shall include such test as is necessary to assure that applicants recognize the "international symbol of access" for the handicapped (sign R7-8, Manual on Uniform Traffic Control Devices) and devices relative to handicapped drivers as set forth in Article 2A of this Chapter. The Division may once reissue operators' licenses without examination to licensed operators who have passed an operator's examination given by the Division subsequent to July 1, 1945, and prior to July 1, 1947. Provided, however, that persons 60 years of age and over, when being examined as herein provided, shall not be required to parallel park a motor vehicle as part of any such examination.

(g) Every chauffeur's license issued under this section shall automatically expire on the birthday of the licensee on the fourth year following the year of issuance and chauffeurs shall renew their licenses every four years after an examination which may include road tests, oral and in the case of literate applicants, written tests, and tests of vision as the Division may require: Provided, that the Commissioner may, in proper cases, waive the examination required by this subsection: Provided, further, that no chauffeur's license issued hereunder shall expire in less than six months from the date of issuance.

Provided further, that no person who applies for the renewal of his chauffeur's license shall be required to take a written examination or road test as a part of any such examination unless such person has been convicted of a traffic violation or had prayer for judgment continued with respect to any traffic violation within a four-year period immediately preceding the date of such person's renewal application or unless such person suffers from a mental or physical condition which impairs his ability to operate a motor vehicle.

(h) Repealed by Session Laws 1979, c. 113, s. 1.

(i) The fee for issuance or reissuance of an operator's license shall be four dollars ($4.00) and the fee for issuance or reissuance of a chauffeur's license shall be ten dollars ($10.00).

(i1) Any person whose operator's or chauffeur's license or other privilege to operate a motor vehicle in this State has been suspended, canceled or revoked pursuant to the provisions of this Chapter shall pay a restoration fee of fifteen dollars ($15.00) to the Division prior to the issuance to such person of a new operator's or chauffeur's license or the restoration of such operator's or chauffeur's license or privilege; such restoration fee shall be paid to the Division in addition to any and all fees which may be provided by law. This restoration fee shall not be required for any licensee whose license was suspended, canceled, or revoked for medical or health reasons following a medical evaluation pursuant to this Chapter.

(1979, c. 37, s. 1; c. 113; c. 178, s. 2; c. 678, ss. 1-3; c. 801, ss. 5, 6.)

Editor's Note. —

Session Laws 1979, c. 37, added the final sentence to subsection (i1). Session Laws 1979, c. 37, s. 2, made the act effective 15 days after its ratification date, February 15, 1979.

Session Laws 1979, c. 113, repealed subsection (h), providing for interim physical examinations for licenses where a licensee's mental or physical condition had changed.

Session Laws 1979, c. 178, effective July 1, 1979, substituted "R7-8" for "D9-6" near the end of the third sentence of subsection (d).

Session Laws 1979, c. 678, effective October 1, 1979, substituted "October 1, 1979" for "January 1, 1978" in the first sentence of subsection (a1), and rewrote the last sentence of subsection (a1), which formerly read: "This section shall not apply to motorcycles which are rated at 190cc (cubic centimeters) or less."

Session Laws 1979, c. 801, effective July 1, 1979, substituted "on the fourth year" for "in the second year" and "four years" for "two years" near the beginning of subsection (g), and deleted the former second paragraph of subsection (g), which exempted from the written examination or road test persons applying for the renewal of a chauffeur's license, with the exception of persons convicted of a traffic violation within a four-year period or persons suffering from a mental or physical condition impairing their ability to operate a motor vehicle. The amendment also, in subsection (i), substituted "ten dollars ($10.00)" for "five dollars ($5.00)."

As the other subsections were not changed by the amendments, they are not set out.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, effective Jan. 1, 1981, will amend this section to read as follows:

"§ 20-7. Drivers' licenses; expiration; examination; fees. — (a) Except as otherwise provided in this Article, no person shall operate a motor vehicle on a highway unless such person has first been licensed by the Division under the provisions of this Article for the type or class of vehicle being driven. Drivers' licenses shall be classified as follows:

(1) Class 'A' which entitles a licensee to drive any vehicle or combination of vehicles, except motorcycles, including all vehicles under Classes 'B' or 'C.'

(2) Class 'B' which entitles a licensee to drive a single vehicle weighing over 30,000 pounds gross vehicle weight, any such vehicle towing a vehicle weighing 10,000 pounds gross vehicle weight or less, a single vehicle designed to carry more than 12 passengers and all vehicles under Class 'C.' A Class 'B' license does not entitle the licensee to drive a motorcycle.

(3) Class 'C' which entitles a licensee to drive a single vehicle weighing 30,000 pounds gross vehicle weight or less, any such vehicle towing a vehicle weighing 10,000 pounds gross vehicle weight or less, and a church bus, farm bus, or activity bus operated for a nonprofit organization when the activity bus is operated for a nonprofit purpose. A Class 'C' license does not entitle the licensee to drive a motorcycle. A Class 'C' license does not entitle the licensee to drive a vehicle designed to carry more than 12 passengers unless this subsection or G.S. 20-218(a) specifically entitle him to do so.

Any unusual vehicle shall be assigned by the Commissioner to the most appropriate class with suitable special restrictions if they appear to be necessary.

Any person who takes up residence in this State on a permanent basis is exempt from the provisions of this subsection for 30 days from the date that residence is established, if he is properly licensed in the jurisdiction of which he is a former resident.

(a1) No driver's license issued on or after October 1, 1979, shall authorize the licensee to

operate a motorcycle unless the license has been appropriately endorsed by the Division to indicate that the licensee has passed special road and written (or oral) tests demonstrating competence to operate a motorcycle. Any person licensed prior to January 1, 1978, who has operated a motorcycle for at least two years prior to that date, will be exempt from the provisions of this subsection upon filing with the Division of Motor Vehicles an affidavit attesting to said two years' experience. Nothing contained in this subsection shall be construed to require a mo-ped operator to have a driver's license.

(b) Every application for a driver's license shall be made upon the approved form furnished by the Division.

(c) No person shall hereafter be issued a driver's license until it is determined that such person is physically and mentally capable of safely operating motor vehicles (of the type or class for which the person applied to be licensed) over the highways of the State. In determining whether or not a person is physically and mentally capable of safely operating motor vehicles over the highways of the State, the Division shall require such person to demonstrate his capability by passing an examination, which may include road tests, oral and in the case of literate applicants written tests, and tests of vision, as the Division may require. The Commissioner may adopt regulations that allow employees of governmental agencies or private businesses to receive a driver's license without taking a road test if the conditions specified in the regulations are complied with. Provided, however, that persons 60 years of age and over, when being examined as herein provided, shall not be required to parallel park a motor vehicle as part of any such examination.

(d) The Division shall cause each person who has heretofore been issued a driver's license to be examined or reexamined, as the case may be, to determine whether or not such person is physically and mentally capable of safely operating motor vehicles over the highways of the State. Those persons found, as a result of such examination or reexamination, to be capable of safely operating motor vehicles over the highways of the State shall be reissued drivers' licenses; and those persons found to be incapable of safely operating motor vehicles over the highways of the State shall not be reissued drivers' licenses. The examination required by this subsection may include such road tests, oral and in the case of literate applicants written tests, and tests of vision, as the Division may require and shall include such test as is necessary to assure that applicants recognize the 'international symbol of access' for the handicapped (sign R7-8, Manual on Uniform Traffic Control Devices) and devices relative to handicapped drivers as set forth in Article 2A of this Chapter. Provided, however, that persons 60 years of age and over, when being examined as herein provided, shall not be required to parallel park a motor vehicle as part of any such examination.

(e) The Division is hereby authorized to grant unlimited licenses or licenses containing such limitations as it may deem advisable. Such limitation or limitations shall be noted on the face of the license, and it shall be unlawful for the holder of a license so limited to operate a motor vehicle without complying with the limitations, and the operation of a motor vehicle without complying with the limitations by a person holding a license with such limitations shall be the equivalent of operating a motor vehicle without a driver's license. If any applicant shall suffer from any physical defect or disease which affects his or her operation of a motor vehicle, the Division may require to be filed with it a certificate of such applicant's condition signed by some medical authority of the applicant's community designated by the Division. This certificate shall in all cases be treated as confidential. Nothing in this subsection shall be construed to prevent the Division from refusing to issue a license, either limited or unlimited, to any person deemed to be incapable of operating a motor vehicle with safety to himself and to the public: Provided, that nothing herein shall prohibit deaf persons from operating motor vehicles who in every other way meet the requirements of this section.

(f) The drivers' licenses issued under this section shall automatically expire on the birthday of the licensee in the fourth year following the year of issuance; and no new license shall be issued to any operator after the expiration of his license until such operator has again passed the examination specified in this section. Any operator may at any time within 60 days prior to the expiration of his license apply for a new license and if the applicant meets the requirements of this Article, the Division shall issue a new license to him. A new license issued within 60 days prior to the expiration of an applicant's old license or within 12 months thereafter shall automatically expire four years from the date of the expiration of the applicant's old license.

Any person serving in the armed forces of the United States on active duty and holding a valid driver's license properly issued under this section and stationed outside the State of North Carolina may renew his license by making application to the Division by mail. Any other person, except a nonresident as defined in this Article, who holds a valid driver's license issued under this section and who is temporarily residing outside North Carolina, may also renew by making application to the Division by mail. For purposes of this section "temporarily" shall mean not less than 30 days continuous absence

from North Carolina. In either case, the Division may waive the examination and color photograph ordinarily required for the renewal of a driver's license, and may impose in lieu thereof such conditions as it may deem appropriate to each particular application; provided that such license shall expire 30 days after licensee returns to North Carolina, and such license shall be designated as temporary.

Provided further, that no person who applies for the renewal of his driver's license shall be required to take a written examination or road test as a part of any such examination unless such person has been convicted of a traffic violation or had prayer for judgment continued with respect to any traffic violation within a four-year period immediately preceding the date of such person's renewal application or unless such person suffers from a mental or physical condition which impairs his ability to operate a motor vehicle.

(g) Repealed by Session Laws 1979, c. 667, s. 6, effective January 1, 1981.

(h) Repealed by Session Laws 1979, c. 113, s. 1.

(i) The fee for issuance or reissuance of a Class 'C' license is four dollars ($4.00). The fee for issuance or reissuance of a Class 'B' or Class 'A' license is ten dollars ($10.00). A person receiving at the same time a driver's license and an endorsement pursuant to G.S. 20-7(a1) shall be charged only the fee required for the class of driver's license he is receiving.

(i1) Any person whose driver's license or other privilege to operate a motor vehicle in this State has been suspended, canceled or revoked pursuant to the provisions of this Chapter shall pay a restoration fee of fifteen dollars ($15.00) to the Division prior to the issuance of such person of a new driver's license or the restoration of such driver's license or privilege; such restoration fee shall be paid to the Division in addition to any and all fees which may be provided by law. This restoration fee shall not be required for any licensee whose license was suspended, canceled, or revoked for medical or health reasons following a medical evaluation pursuant to this Chapter.

(j) The fees collected under this section and G.S. 20-14 shall be placed in the Highway Fund.

(k) Any person operating a motor vehicle in violation of this section shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this section.

(l) Any person who except for lack of instruction in operating a motor vehicle would be qualified to obtain an operator's license under this Article may apply for a temporary learner's permit, and the Division shall issue such permit, entitling the applicant, while having such permit in his immediate possession, to drive a specified type or class of motor vehicle upon the highways for a period of 18 months. The fee for issuance of a temporary learner's permit shall be two dollars ($2.00). Any such learner's permit may be renewed, or a second learner's permit may be issued, for an additional period of 18 months. The permittee must, while operating a motor vehicle over the highways, be accompanied by a person who is licensed to operate the class or type of vehicle being operated and who is seated in the seat beside the permittee.

The fee for the issuance of a renewal or a second temporary learner's permit shall be three dollars and twenty-five cents ($3.25).

(l-1) The Division upon receiving proper application may in its discretion issue a restricted instruction permit effective for a school year or a lesser period to an applicant who is enrolled in a driver training program as provided for in G.S. 20-88.1 even though the applicant has not yet reached the legal age to be eligible for a driver's license. Such instruction permit shall entitle the permittee when he has such permit in his immediate possession to operate a specified type or class of motor vehicle subject to the restrictions imposed by the Division. The restrictions which the Division may impose on such permits include but are not limited to restrictions to designated areas and highways and restrictions prohibiting operation except when an approved instructor is occupying a seat beside the permittee.

(m) The Division upon receiving proper application may in its discretion issue a restricted instruction permit effective for a school year or a lesser period to an applicant who is enrolled in a driver-training program approved by the State Superintendent of Public Instruction even though the applicant has not yet reached the legal age to be eligible for a driver's license. Such instruction permit shall entitle the permittee when he has such permit in his immediate possession to operate a specified type or class of motor vehicle subject to the restrictions imposed by the Division. The restrictions which the Division may impose on such permits include but are not limited to restrictions to designated areas and highways and restrictions prohibiting operation except when an approved instructor is occupying a seat beside the permittee.

(n) Every driver's license issued by the Division shall bear thereon the distinguishing number assigned to the licensee and color photograph of the licensee of a size approved by the Commissioner and shall contain the name, age, residence address and a brief description of the licensee, who, for the purpose of identification and as a condition precedent to the validity of the license, immediately upon receipt thereof, shall endorse his or her regular signature in ink upon the same in the space provided for that purpose unless a facsimile of his or her signature appears thereon; provided

the requirement that a color photograph of the licensee appear on the license may be waived by the Commissioner upon satisfactory proof that the taking of such photograph violates the religious convictions of the licensee. Such license shall be carried by the licensee at all times while engaged in the operation of a motor vehicle. However, no person charged with failing to carry a license shall be convicted if he produces in court a driver's license issued to him which was valid at the time of his arrest for the type or class of vehicle he was operating at the time of his arrest.

(o) Any person convicted of violating any provision of this section shall be guilty of a misdemeanor and punished in the discretion of the court: Provided, that no person shall be convicted of operating a motor vehicle without a driver's license if he produces in court at the time of his trial upon such charge an expired driver's license and a renewal driver's license issued to him within 30 days of the expiration date of the expired license and which would have been a defense to the charge had it been issued prior to the time of the alleged offense."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

A violation of this section is not statutorily a lesser included offense of § 20-28. State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

The defendant could not be prosecuted for driving while his license was permanently revoked in violation of § 20-28 because of the prohibition against double jeopardy, where the defendant had previously pled guilty to driving without a license in violation of this section based upon the same event. While a violation of this section is not statutorily a lesser included offense of a violation of § 20-28, under the "additional facts test" of double jeopardy when applied to the defendant's offenses, the two offenses were the same both in fact and in law since the evidence that the defendant was driving an automobile while his license had been permanently revoked would sustain a conviction for driving without a license. State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

§ 20-7.01. Renewal of licenses after January 1, 1981. — (a) All operators' and chauffeurs' licenses issued before January 1, 1981, are valid until their normal date of expiration, subject to this Chapter's provisions for cancellation and suspension of drivers' licenses.

(b) A person holding a valid operator's or chauffeur's license on January 1, 1981, whose license expires after that date may receive a Class "C" license without taking a written or road test if he complies with the provisions of G.S. 20-7(f).

(c) A person holding a valid operator's or chauffeur's license on January 1, 1981, whose license expires after that date may receive a Class "A" or "B" license without taking a written or road test if:

(1) He files with the Division an affidavit stating that he was licensed by North Carolina on January 1, 1981, and that he has operated a vehicle of the class for which he wishes to be licensed for at least one year prior to that date; and

(2) He complies with the provisions of G.S. 20-7(f).

An applicant who is not exempt from the road and written tests pursuant to this subsection is deemed to be an original applicant. (1979, c. 667, s. 12.)

Editor's Note. — Session Laws 1979, c. 667, s. 43, makes the act effective Jan. 1, 1981, and provides that s. 12 of the act, which added this section, is repealed on July 1, 1986.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-7.1. Notification of change of address. — Whenever the holder of a license issued under the provision of G.S. 20-7 has a change in the address as shown on such license, he or she shall apply for a duplicate license within 60 days after such address has been changed. (1975, c. 223, s. 1; 1979, c. 970.)

Editor's Note. — The 1979 amendment, effective October 1, 1979, substituted "provision" for "provisions," "has a change in the" for "changes his or her," and "apply for a duplicate license" for "notify the Division of Motor Vehicles of such change."

§ 20-8. Persons exempt from license. — The following are exempt from license hereunder:

(7) Any person who is at least 16 years of age while operating a mo-ped. (1935, c. 52, s. 3; 1963, c. 1175; 1973, c. 1017; 1975, c. 859, s. 2; 1979, c. 574, s. 7.)

Editor's Note. —

The 1979 amendment, effective July 1, 1979, substituted "while operating a mo-ped" for "and while operating a bicycle with a helper motor rated less than one brake horsepower which produces only ordinary pedaling speeds up to a maximum of 20 miles per hour" in subdivision (7).

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (7) are set out.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 13, effective Jan. 1, 1981, will amend this section to read as follows:

"**§ 20-8. Persons exempt from license.** — The following are exempt from license hereunder:

(1) Any person while operating a motor vehicle the property of and in the service of the armed forces of the United States. This shall not be construed to exempt any operators of the United States Civilian Conservation Corps motor vehicles;

(2) Any person while driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway;

(3) A nonresident who is at least 16 years of age who has in his immediate possession a valid driver's license issued to him in his home state or country if the nonresident is operating a motor vehicle in this State in accordance with the license restrictions and vehicle classifications that would be applicable to him under the laws and regulations of his home state or country if he were driving in his home state or country.

(4) to (6) Repealed by Session Laws 1979, c. 667, s. 13, effective January 1, 1981.

(7) Any person who is at least 16 years of age and while operating a mo-ped."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-9. What persons shall not be licensed.

Editor's Note. —

For a note discussing the extension of the family purpose doctrine to motorcycles and private property, see 14 Wake Forest L. Rev. 699 (1978).

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, ss. 14, 41, effective Jan. 1, 1981, will amend this section to read as follows:

"**§ 20-9. What persons shall not be licensed.** — (a) A Class 'C' license shall not be issued to any person under 16 years of age and no Class 'A' or Class 'B' license shall be issued to any person under 18 years of age.

(b) The Division shall not issue a driver's license to any person whose license has been suspended or revoked during the period for which the license was suspended or revoked.

(c) The Division shall not issue a driver's license to any person who is an habitual drunkard or is an habitual user of narcotic drugs or barbiturates, whether or not such use be in accordance with the prescription of a physician.

(d) No driver's license shall be issued to any applicant who has been previously adjudged insane or an idiot, imbecile, or feebleminded, and who has not at the time of such application been restored to competency by judicial decree or released from a hospital for the insane or feebleminded upon a certificate of the superintendent that such person is competent, nor then unless the Division is satisfied that such person is competent to operate a motor vehicle with safety to persons and property.

(e) The Division shall not issue a driver's license to any person when in the opinion of the Division such person is afflicted with or suffering from such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways, nor shall a license be issued

to any person who is unable to understand highway warnings or direction signs.

(f) The Division shall not issue a driver's license to any person whose license or driving privilege is in a state of suspension or revocation in any jurisdiction, if the acts or things upon which the suspension or revocation in such other jurisdiction was based would constitute lawful grounds for suspension or revocation in this State had those acts or things been done or committed in this State.

(g) The Division may issue a driver's license to any applicant covered by subsection (e) of this section under the following conditions:

(1) The Division may issue a license to any person who is afflicted with or suffering from physical or mental disability set out in subsection (e) of this section who is otherwise qualified to obtain a license, provided such person submits to the Division a certificate in the form prescribed in subdivision (2). Unless sooner revoked, suspended or cancelled, such license continues in force as long as the licensee presents to the Division one year from the date of issuance of such license and at yearly intervals thereafter a certificate in the form prescribed in subdivision (2), provided the Commissioner may require the submission of such certificate at six month intervals where in his opinion public safety demands. In no event shall a license issued pursuant to this section be valid beyond the birthday of the licensee in the fourth year following the year of issuance, at which time the license is subject to renewal.

(2) The Division shall not issue a license pursuant to this section unless the applicant has submitted to a physical examination by a physician or surgeon duly licensed to practice medicine in this State and unless such examining physician or surgeon has completed and signed the certificate required by subdivision (1). Such certificate shall be devised by the Commissioner with the advice of qualified experts in the field of diagnosing and treating physical and mental disorders as he may select to assist him and shall be designed to elicit the maximum medical information necessary to aid in determining whether or not it would be a hazard to public safety to permit the applicant to operate a motor vehicle, including, if such is the fact, the examining physician's statement that the applicant is under medication and treatment and that such person's physical or mental disability is controlled. The certificate shall contain a waiver of privilege and the recommendation of the examining physician to the Commissioner as to whether a license should be issued to the applicant.

(3) The Commissioner is not bound by the recommendation of the examining physician but shall give fair consideration to such recommendation in exercising his discretion in acting upon the application, the criterion being whether or not, upon all the evidence, it appears that it is safe to permit the applicant to operate a motor vehicle. The burden of proof of such fact is upon the applicant. In deciding whether to issue or deny a license, the Commissioner may be guided by opinion of experts in the field of diagnosing and treating the specific physical or mental disorder suffered by an applicant and such experts may be compensated for their services on an equitable basis. The Commissioner may also take into consideration any other factors which bear on the issue of public safety.

(4) Whenever a license is denied by the Commissioner, such denial may be reviewed by a reviewing board upon written request of the applicant filed with the Division within 10 days after receipt of such denial. The reviewing board shall consist of the Commissioner or his authorized representative and four persons designated by the chairman of the Commission for Health Services. The persons designated by the chairman of the Commission for Health Services shall be either members of the Commission for Health Services or physicians duly licensed to practice medicine in this State. The members so designated by the chairman of the Commission for Health Services shall receive the same per diem and expenses as provided by law for members of the Commission for Health Services, which per diem and expenses shall be charged to the same appropriation as per diems and expenses for members of the Commission for Health Services. The Commissioner or his authorized representative, plus any two of the members designated by the chairman of the Commission for Health Services, constitute a quorum. The procedure for hearings authorized by this section shall be as follows:

a. Applicants shall be afforded an opportunity for hearing, after reasonable notice of not less than 10 days, before the review board

established by subdivision (4). The notice shall be in writing and shall be delivered to the applicant in person or sent by certified mail, with return receipt requested. The notice shall state the time, place, and subject of the hearing.

b. The review board may compel the attendance of witnesses and the production of such books, records and papers as it desires at a hearing authorized by the section. Upon request of an applicant, a subpoena to compel the attendance of any witness or a subpoena duces tecum to compel the production of any books, records, or papers shall be issued by the board. Subpoenas shall be directed to the sheriff of the county where the witness resides or is found and shall be served and returned in the same manner as a subpoena in a criminal case. Fees of the sheriff and witnesses shall be the same as that allowed in the district court in cases before that court and shall be paid in the same manner as other expenses of the Division of Motor Vehicles are paid. In any case of disobedience or neglect of any subpoena served on any person, or the refusal of any witness to testify to any matters regarding which he may be lawfully interrogated, the district court or superior court where such disobedience, neglect or refusal occurs, or any judge thereof, on application by the board, shall compel obedience or punish as for contempt.

c. A hearing may be continued upon motion of the applicant for good cause shown with approval of the board or upon order of the board.

d. The board shall pass upon the admissibility of evidence at a hearing but the applicant affected may at the time object to the board's ruling, and, if evidence offered by an applicant is rejected the party may proffer the evidence, and such proffer shall be made a part of the record. The board shall not be bound by common law or statutory rules of evidence which prevail in courts of law or equity and may admit and give probative value to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They may exclude incompetent, immaterial, irrelevant and unduly repetitious evidence. Uncontested facts may be stipulated by agreement between an applicant and the board and evidence relating thereto may be excluded. All evidence, including records and documents in the possession of the Division of Motor Vehicles or the board, of which the board desires to avail itself shall be made a part of the record. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. The board shall prepare an official record, which shall include testimony and exhibits. A record of the testimony and other evidence submitted shall be taken, but it shall not be necessary to transcribe shorthand notes or electronic recordings unless requested for purposes of court review.

e. Every decision and order adverse to an applicant shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the board's conclusions on each contested issue of fact. Counsel for applicant, or applicant, if he has no counsel, shall be notified of the board's decision in person or by registered mail with return receipt requested. A copy of the board's decision with accompanying findings and conclusions shall be delivered or mailed upon request to applicant's attorney of record or to applicant, if he has no attorney.

f. Actions of the reviewing board are subject to judicial review as provided under Chapter 150A of the General Statutes.

g. Repealed by Session Laws 1977, c. 840.

h. All records and evidence collected and compiled by the Division and the reviewing board shall not be considered public records within the meaning of Chapter [section] 132-1, and following, of the General Statutes of North Carolina and may be made available to the public only upon an order of a court of competent jurisdiction. All information furnished by or on behalf of an applicant under this section shall be without prejudice

and shall be for the use of the Division, the reviewing board or the court in administering this section and shall not be used in any manner as evidence, or for any other purposes in any trial, civil or criminal.

(h) The Division shall not issue a driver's license to an applicant who is the holder of any license to drive issued by another state, district or territory of the United States and currently in force, unless the applicant surrenders such license or licenses; provided, this section shall not apply to nonresident military personnel or members of their household."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

Cited in Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977).

§ 20-10.1. Mo-peds. — It shall be unlawful for any person who is under the age of 16 years to operate a mo-ped as defined in G.S. 20-4.01(27)d1 upon any highway or public vehicular area of this State. (1979, c. 574, s. 8.)

Editor's Note. — Session Laws 1979, c. 574, s. 9, makes the act effective July 1, 1979.

§ 20-11. Application of minors.

(b) The Division may grant an application for a limited learner's permit of any minor under the age of 16, who otherwise meets the requirements of licensing under this section, when such application is signed by both the applicant and his or her parent or guardian or some other responsible adult with whom the applicant resides and is approved by the Division of Motor Vehicles. The limited learner's permit shall entitle the applicant, while having the permit in his immediate possession, to drive a motor vehicle upon the highways while accompanied by a parent, guardian, or other person approved by the Division, who is licensed under this Chapter to operate a motor vehicle and who is actually occupying a seat beside the driver. The limited learner's permit shall be valid for six months or until the applicant attains the age of 16, whichever period is greater. Provided, however, a limited learner's permit as herein provided shall be issued only to those applicants who have reached the age of 15 years. In the event a minor who has been issued a limited learner's permit under this subsection operates a motor vehicle in violation of any provision herein, the permit shall be canceled.

Provided a driver who holds a learner's permit only shall not be deemed a male operator under age 25 for the purpose of determining the insurance premium rate for persons insured under automobile property damage and bodily injury liability insurance policies.

(1979, c. 101.)

Editor's Note. —

The 1979 amendment, effective October 1, 1979, substituted "The" for "Such" at the beginning of the second sentence of subsection (b), substituted "the" for "such" after "having" in that sentence, and deleted "for a period of six months" before "while" and "such minor is" after "while" in the same sentence. The amendment added the third sentence of subsection (b).

As subsections (a) and (c) were not changed by the amendment, only subsection (b) is set out.

Amendment Effective July 1, 1981. — Session Laws 1979, c. 667, ss. 15, 16, 41, effective July 1, 1981, will amend this section to read as follows:

"**§ 20-11. Application of minors.** — (a) The Division shall not grant the application of any minor between the ages of 16 and 18 years for a driver's license or a learner's permit unless such application is signed both by the applicant and by the parent, guardian, husband, wife or employer of the applicant, or, if the applicant has no parent, guardian, husband, wife or employer residing in this State, by some other responsible adult person. It shall be unlawful for any person to sign the application of a minor under the provisions of this section when such application

misstates the age of the minor and any person knowingly violating this provision shall be guilty of a misdemeanor.

The Division shall not grant the application of any minor between the ages of 16 and 18 years for a driver's license unless such minor presents evidence of having satisfactorily completed the driver training and safety education courses offered at the public high schools as provided in G.S. 20-88.1 or upon having satisfactorily completed a course of driving instruction offered at a licensed commercial driver training school or an approved nonpublic secondary school, provided instruction offered in such schools shall be approved by the State Commissioner of Motor Vehicles and the State Superintendent of Public Instruction and all expenses for such instruction shall be paid by the persons enrolling in such courses and/or by the schools offering them.

(b) The Division may grant an application for a limited learner's permit of any minor under the age of 16, who otherwise meets the requirements of licensing under this section, when such application is signed by both the applicant and his or her parent or guardian or some other responsible adult with whom the applicant resides and is approved by the Division of Motor Vehicles. The limited learner's permit shall entitle the applicant, while having the permit in his immediate possession, to drive a motor vehicle upon the highways while accompanied by a parent, guardian, or other person approved by the Division, who is licensed under this Chapter to operate a motor vehicle and who is actually occupying a seat beside the driver. The limited learner's permit shall be valid for six months or until the applicant attains the age of 16, whichever period is greater. Provided, however, a limited learner's permit as herein provided shall be issued only to those applicants who have reached the age of 15 years. In the event a minor who has been issued a limited learner's permit under this subsection operates a motor vehicle in violation of any provision herein, the permit shall be canceled.

Provided a driver who holds a learner's permit only shall not be deemed a male operator under age 25 for the purpose of determining the insurance premium rate for persons insured under automobile property damage and bodily injury liability insurance policies.

(c) The Division may, upon satisfactory proof that a minor between the ages of 16 and 18 years has become a resident of North Carolina and holds a valid motor vehicle driver's license from his prior state of residence but has not completed a course in driver education which meets the requirements of this State, grant to such minor a temporary driver's permit under such terms and conditions as shall be deemed necessary by the Division to allow the minor to operate a motor vehicle of a specified type or class in this State in order to obtain the driver education courses necessary for driver's license in North Carolina. Every application for a temporary driver's permit shall be made upon the approved form furnished by the Division. A temporary driver's permit issued pursuant to this section shall be subject to all provisions of law relating to driver's license."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-12. Instruction.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 17, will amend this section to read as follows:

"**§ 20-12. Instruction.** — Any licensed driver may instruct a person who is 16 or more years of age in the operation of any motor vehicle that the person instructing is licensed to drive. Any person so instructing another must actually occupy the seat beside the permittee."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-13. Suspension of license of provisional licensee. — (a) The Division may suspend, with or without a preliminary hearing, the operator's license of a provisional licensee upon receipt of notice of the licensee's conviction of a motor vehicle moving violation, in accordance with subsection (b), if the offense was committed while the person was still a provisional licensee. A provisional licensee is a licensee who is under 18 years of age. As used in this section, the phrase "motor vehicle moving violation" does not include the offenses listed in the third paragraph of G.S. 20-16(c) for which no points are assessed, nor does it include equipment violations specified in Part 9 of Article 3 of this Chapter.

(b) The Division may suspend the license of a provisional licensee as follows:

(1) For the first motor vehicle moving violation, the Division may not suspend the license of the provisional licensee. The Division must mail the licensee a warning letter, sent to his last known address, but failure of the licensee to receive the letter does not prevent the suspension of the person's license or the imposition of probation under this section.

(2) For conviction of a second motor vehicle moving violation committed within 12 months of the date the first offense was committed, the Division may suspend the licensee's license for up to 30 days.

(3) For conviction of a third motor vehicle moving violation committed within 12 months of the date the first offense was committed, the Division may suspend the licensee's license for up to 90 days.

(4) For conviction of a fourth motor vehicle moving violation committed within 12 months of the date the first offense was committed, the Division may suspend the licensee's license for up to six months.

The Division may, in lieu of suspension and with the written consent of the licensee, place the licensee on probation for a period of not more than 12 months on such terms and conditions as the Division sees fit to impose.

If the Division suspends the provisional licensee's license for at least 90 days without a preliminary hearing, the parent, guardian or other person standing in loco parentis of the provisional licensee may request a hearing to determine if the provisional licensee's license should be restored on a probationary status. The Division may wait until one-half the period of suspension has expired to hold the hearing. The Division may place the licensee on probation for up to 12 months on such terms and conditions as the Division sees fit to impose, if the licensee consents in writing to the terms and conditions of probation.

(c) In the event of conviction of two or more motor vehicle moving offenses committed on a single occasion, a licensee shall be charged, for purposes of this section, with only one moving offense, except as otherwise provided.

(d) The suspension provided for in this section is in addition to any other remedies which the Division may have against a licensee under other provisions of law; however, when the license of any person is suspended under this section and at the same time is also suspended under other provisions of law, the suspensions run concurrently.

(e) Operators whose licenses have been suspended under the provisions of this section are not required to maintain proof of financial responsibility upon reissuance of the license solely because of suspension pursuant to this section, except as provided under Article 13 of this Chapter. The registered owner's liability insurance policy shall insure said licensee who is a member of said registered owner's household or anyone who is in lawful possession of said automobile. (1963, c. 968, s. 1; 1965, c. 897; 1967, c. 295, s. 1; 1971, c. 120, ss. 1, 2; 1973, c. 439; 1975, c. 716, s. 5; 1979, c. 555, s. 1.)

Editor's Note. —

The 1979 amendment reworte this section, which formerly provided for mandatory revocation of licenses of provisional licensees.

Session Laws 1979, c. 555, s. 3, provides: "The provisions of this act shall not affect suspension orders promulgated pursuant to G.S. 20-13 or G.S. 20-13.1 before the effective date of this act [May 14, 1979]."

§ 20-13.1: Repealed by Session Laws 1979, c. 555, s. 2.

Editor's Note. —

Session Laws 1979, c. 555, s. 3, provides: "The provisions of this act shall not affect suspension orders promulgated pursuant to G.S. 20-13 or G.S. 20-13.1 before the effective date of this act [May 14, 1979]."

§ 20-14. Duplicate licenses.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 41, will amend this section to read as follows:

"**§ 20-14. Duplicate licenses.** — In the event that driver's license is lost or destroyed, or if it is necessary to change the name or address thereon, the person to whom the license is issued may, upon payment of a fee of one dollar ($1.00) and upon furnishing proof satisfactory to the Division that the license has been lost or destroyed, or that the person's name or address has been changed, obtain a duplicate or substitute license."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-15. Authority of Division to cancel license.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 41, will amend subsection (a) of this section to read as follows:

"(a) The Division shall have authority to cancel any driver's license upon determining that the licensee was not entitled to the issuance thereof hereunder, or that said licensee failed to give the required or correct information in his application, or committed fraud in making such application."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-16. Authority of Division to suspend license. — (a) The Division shall have authority to suspend the license of any operator or chauffeur with or without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee:

(1) to (4) Repealed by Session Laws 1979, c. 36, effective October 1, 1979;

(5) Has, under the provisions of subsection (c) of this section, within a three-year period, accumulated 12 or more points, or eight or more points in the three-year period immediately following the reinstatement of a license which has been suspended or revoked because of a conviction for one or more traffic offenses;

(6) Has made or permitted an unlawful or fraudulent use of such license or a learner's permit, or has displayed or represented as his own, a license or learner's permit not issued to him;

(7) Has committed an offense in another state, which if committed in this State would be grounds for suspension or revocation;

(8) Has been convicted of illegal transportation of intoxicating liquors;

(9) Has, within a period of 12 months, been convicted of two or more charges of speeding in excess of 55 and not more than 80 miles per hour, or of one or more charges of reckless driving and one or more charges of speeding in excess of 55 and not more than 80 miles per hour;

(10) Has been convicted of operating a motor vehicle at a speed in excess of 75 miles per hour on a public road or highway where the maximum speed is less than 70 miles per hour;

(10a) Has been convicted of operating a motor vehicle at a speed in excess of 80 miles per hour on a public highway where the maximum speed is 70 miles per hour; or

(11) Has been sentenced by a court of record and all or a part of the sentence has been suspended and a condition of suspension of the sentence is that the operator or chauffeur not operate a motor vehicle for a period of time.

(1979, c. 36.)

Editor's Note. —

The 1979 amendment, effective October 1, 1979, deleted subdivisions (a)(1) through (a)(4).

As the other subsections were not changed by the amendment, they are not set out.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, ss. 18 and 41, will amend this section to read as follows:

"**§ 20-16. Authority of Division to suspend license.** — (a) The Division shall have authority to suspend the license of any operator with or without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee:

(1) to (4) Repealed by Session Laws 1979, c. 36, effective October 1, 1979;

(5) Has, under the provisions of subsection (c) of this section, within a three-year period, accumulated 12 or more points, or eight or more points in the three-year period immediately following the reinstatement of a license which has been suspended or revoked because of a conviction for one or more traffic offenses;

(6) Has made or permitted an unlawful or fraudulent use of such license or a learner's permit, or has displayed or represented as his own, a license or learner's permit not issued to him;

(7) Has committed an offense in another state, which if committed in this State would be grounds for suspension or revocation;

(8) Has been convicted of illegal transportation of intoxicating liquors;

(9) Has, within a period of 12 months, been convicted of two or more charges of speeding in excess of 55 and not more than 80 miles per hour, or of one or more charges of reckless driving and one or more charges of speeding in excess of 55 and not more than 80 miles per hour;

(10) Has been convicted of operating a motor vehicle at a speed in excess of 75 miles per hour on a public road or highway where the maximum speed is less than 70 miles per hour;

(10a) Has been convicted of operating a motor vehicle at a speed in excess of 80 miles per hour on a public highway where the maximum speed is 70 miles per hour; or

(11) Has been sentenced by a court of record and all or a part of the sentence has been suspended and a condition of suspension of the sentence is that the operator not operate a motor vehicle for a period of time.

(b) Pending an appeal from a conviction of any violation of the motor vehicle laws of this State, no driver's license shall be suspended by the Division of Motor Vehicles because of such conviction or because of evidence of the commission of the offense for which the conviction has been had.

(c) The Division shall maintain a record of convictions of every person licensed or required to be licensed under the provisions of this Article as an operator and shall enter therein records of all convictions of such persons for any violation of the motor vehicle laws of this State and shall assign to the record of such person, as of the date of commission for the offense, a number of points for every such conviction in accordance with the following schedule of convictions and points, except that points shall not be assessed for convictions resulting in suspensions or revocations under other provisions of laws: Further, any points heretofore charged for violation of the motor vehicle inspection laws shall not be considered by the Division of Motor Vehicles as a basis for suspension or revocation of driver's license:

Schedule of Point Values

Passing stopped school bus 5
Reckless driving 4
Hit and run, property damage only . . . 4
Following too close 4
Driving on wrong side of road 4
Illegal passing 4
Running through stop sign 3
Speeding in excess of 55 miles per hour . 3
Failing to yield right-of-way 3
Running through red light 3
No driver's license or license expired more than one year 3
Failure to stop for siren 3
Driving through safety zone 3
No liability insurance 3
Failure to report accident where such report is required 3
Speeding in a school zone in excess of the posted school zone speed limit 3
All other moving violations 2

The [above] provisions of this subsection shall only apply to violations and convictions which take place within the State of North Carolina.

No points shall be assessed for conviction of the following offenses:

Overloads
Over length
Over width
Over height
Illegal parking
Carrying concealed weapon
Improper plates
Improper registration

Improper muffler
Public drunk within a vehicle
Possession of liquor
Improper display of license plates or dealers' tags
Unlawful display of emblems and insignia
Failure to display current inspection certificate.

In case of the conviction of a licensee of two or more traffic offenses committed on a single occasion, such licensee shall be assessed points for one offense only and if the offenses involved have a different point value, such licensee shall be assessed for the offense having the greater point value.

Upon the restoration of the license or driving privilege of such person whose license or driving privilege has been suspended or revoked because of conviction for a traffic offense, any points that might previously have been accumulated in the driver's record shall be cancelled.

Whenever a licensee accumulates as many as four points hereunder, the Division shall mail a letter of warning to the licensee at his last known address, but failure to receive such warning letter shall not prevent a suspension under this subsection. Whenever any licensee accumulates as many as seven points or accumulates as many as four points during a three-year period immediately following reinstatement of his license after a period of suspension or revocation, the Division may request the licensee to attend a conference regarding such licensee's driving record. The Division may also afford any licensee who has accumulated as many as seven points or any licensee who has accumulated as many as four points within a three-year period immediately following reinstatement of his license after a period of suspension or revocation an opportunity to attend a driver improvement clinic operated by the Division and, upon the successful completion of the course taken at the clinic, three points shall be deducted from the licensee's conviction record; provided, that only one deduction of points shall be made on behalf of any licensee within any 10-year period.

When a license is suspended under the point system provided for herein, the first such suspension shall be for not more than 60 days; the second such suspension shall not exceed six months and any subsequent suspension shall not exceed one year.

Whenever the driver's license of any person is subject to suspension under this subsection and at the same time also subject to suspension or revocation under other provisions of laws, such suspensions or revocations shall run concurrently.

In the discretion of the Division, a period of probation not to exceed one year may be substituted for suspension or for any unexpired period of suspension under subsections (a)(1) through (a)(10a) of this section. Any violation of probation during the probation period shall result in a suspension for the unexpired remainder of the suspension period. Any accumulation of three or more points under this subsection during a period of probation shall constitute a violation of the condition of probation.

(d) Upon suspending the license of any person as hereinbefore in this section authorized, the Division shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing, unless a preliminary hearing was held before his license was suspended, as early as practical within not to exceed 20 days after receipt of such request in the county wherein the licensee resides unless the Division and the licensee agree that such hearing may be held in some other county, and such notice shall contain the provisions of this section printed thereon. Upon such hearing the duly authorized agents of the Division may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a reexamination of the licensee. Upon such hearing the Division shall either rescind its order of suspension, or good cause appearing therefor, may extend the suspension of such license. Provided further upon such hearing, preliminary or otherwise, involving subsections (a)(1) through (a)(10a) of this section, the Division may for good cause appearing in its discretion substitute a period of probation not to exceed one year for the suspension or for any unexpired period of suspension. Probation shall mean any written agreement between the suspended driver and a duly authorized representative of the Division and such period of probation shall not exceed one year, and any violation of the probation agreement during the probation period shall result in a suspension for the unexpired remainder of the suspension period. The authorized agents of the Division shall have the same powers in connection with a preliminary hearing prior to suspension as this subsection provided in connection with hearings held after suspension."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

I. IN GENERAL.

The power to issue, suspend or revoke a driver's license is vested exclusively in the Division of Motor Vehicles, subject to review by the superior court and, upon appeal, by the appellate division. Smith v. Walsh, 34 N.C. App. 287, 238 S.E.2d 157 (1977).

Power to suspend, etc. —

Under subdivision (a)(10) of this section and § 20-19(b), the discretionary authority to suspend petitioner's license for a period not exceeding 12 months was vested exclusively in the Division of Motor Vehicles. No discretionary power was conferred upon a superior court. Smith v. Walsh, 34 N.C. App. 287, 238 S.E.2d 157 (1977).

Stated in State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office, 293 N.C. 365, 239 S.E.2d 48 (1977).

Cited in In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977); Heritage Village Church & Missionary Fellowship, Inc. v. State, 40 N.C. App. 429, 253 S.E.2d 473 (1979); State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979); Noyes v. Peters, 40 N.C. App. 763, 253 S.E.2d 584 (1979).

§ 20-16.1. Mandatory suspension of driver's license upon conviction of excessive speeding; limited driving permits for first offenders.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, ss. 19 and 41, will amend this section to read as follows:

"§ 20-16.1. Mandatory suspension of driver's license upon conviction of excessive speeding; limited driving permits for first offenders. — (a) Notwithstanding any other provisions of this Article, the Division shall suspend for a period of 30 days the license of any driver without preliminary hearing on receiving a record of such driver's conviction of exceeding by more than 15 miles per hour the speed limit, either within or outside the corporate limits of a municipality, if such person was also driving at a speed in excess of 55 miles per hour at the time of the offense.

(b) (1) Upon a first conviction only of violating subsection (a), the trial judge may when feasible allow a limited driving privilege or license to the person convicted for proper purposes reasonably connected with the health, education and welfare of the person convicted and his family. For purposes of determining whether conviction is a first conviction, no prior offense occurring more than 10 years before the date of the current offense shall be considered. The judge may impose upon such limited driving privilege any restrictions as in his discretion are deemed advisable including, but not limited to, conditions of days, hours, types of vehicles, routes, geographical boundaries and specific purposes for which limited driving privilege is allowed. Any such limited driving privilege allowed and restrictions imposed thereon shall be specifically recorded in a written judgment which shall be as near as practical to that hereinafter set forth and shall be signed by the trial judge and shall be affixed with the seal of the court and shall be made a part of the records of the said court. A copy of said judgment shall be transmitted to the Division of Motor Vehicles along with any driver's license in the possession of the person convicted and a notice of the conviction. Such permit issued hereunder shall be valid for such length of time as shall be set forth in the judgment of the trial judge. Such permit shall constitute a valid license to operate motor vehicles of the class or type that would be allowed by the person's license if it were not currently revoked upon the streets and highways of this or any other state in accordance with the restrictions noted thereon and shall be subject to all provisions of law relating to driver's license, not by their nature, rendered inapplicable.

(2) The judgment issued by the trial judge as herein permitted shall as near as practical be in form and content as follows:

IN THE GENERAL COURT
OF JUSTICE
RESTRICTED DRIVING
PRIVILEGES

STATE OF NORTH CAROLINA
COUNTY OF . . . . . .

This cause coming on to be heard and being heard before the Honorable . . . . . ., Judge presiding, and it appearing to the court that the defendant, ..., has been convicted of the offense of excessive speeding in violation of G.S. 20-16.1(a), and it further appearing to the court that the defendant should be issued a restrictive driving license and is entitled to the issuance of a restrictive driving privilege under and by the authority of G.S. 20-16.1(b);

Now, therefore, it is ordered, adjudged and decreed that the defendant be allowed to operate a motor vehicle under the following conditions and under no other circumstances.

Name: . . . . . .

Race: . . . . . Sex: . . . . . .
Height: . . . . . Weight: . . . . . .
Color of Hair: . . . . . .
Color of Eyes: . . . . . .
Birth Date: . . . . . .

Driver's License Number: . . . . .
Signature of Licensee: . . . . . .
Conditions of Restriction: . . . . . .
Type of Vehicle: . . . . . .
Geographic Restrictions: . . . . . .
Hours of Restriction: . . . . . .
Other Restrictions: . . . . . .

This limited license shall be effective from . . . . to . . . subject to further orders as the court in its discretion may deem necessary and proper.

This the . . . . day of . . . ., 19. . .

. . . . . .

(Judge Presiding)

(3) Upon conviction of such offense outside the jurisdiction of this State the person so convicted may apply to the resident judge of the superior court of the district in which he resides for limited driving privileges hereinbefore defined. Upon such application the judge shall have the authority to issue such limited driving privileges in the same manner as if he were the trial judge.

(4) Any violation of the restrictive driving privileges as set forth in the judgment of the trial judge allowing such privileges shall constitute the offense of driving while license has been suspended as set forth in G.S. 20-28. Whenever a person is charged with operating a motor vehicle in violation of the restrictions, the limited driving privilege shall be suspended pending the final disposition of the charge.

(5) This section is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina.

(c) Upon conviction of a similar second or subsequent offense which offense occurs within one year of the first or prior offense, the license of such operator shall be suspended for 60 days, provided such first or prior offense occurs subsequent to July 1, 1953.

(d) Notwithstanding any other provisions of this Article, the Division shall suspend for a period of 60 days the license of any driver without preliminary hearing on receiving a record of such driver's conviction of having violated the laws against speeding described in subsection (a) and of having violated the laws against reckless driving on the same occasion as the speeding offense occurred.

(e) The provisions of this section shall not prevent the suspension or revocation of a license for a longer period of time where the same may be authorized by other provisions of law.

(f) Operators whose licenses have been suspended under the provisions of this section shall not be required to maintain proof of financial responsibility upon reissuance of the license solely because of suspension pursuant to this section."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-16.2. Mandatory revocation of license in event of refusal to submit to chemical tests; right of driver to request test.

(h) Repealed by Session Laws 1979, c. 423, s. 2.

(1979, c. 423, s. 2.)

Cross Reference. — For definition of "public vehicular area," see § 20-4.1, subdivision (32).

As to the availability of test records, see § 20-27.

Editor's Note. —

The 1979 amendment repealed subsection (h), which defined "public vehicular area."

Because this section imposes a penalty, it must be strictly construed. Price v. North Carolina Dep't of Motor Vehicles, 36 N.C. App. 698, 245 S.E.2d 518, appeal dismissed, 295 N.C. 551, 248 S.E.2d 728 (1978).

The purpose of administering the breathalyzer test is to produce an accurate result. Bell v. Powell, 41 N.C. App. 131, 254 S.E.2d 191 (1979).

Administration of the breathalyzer test, etc. —

In accord with original. See In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

Subsection (a) of this section provides that administration of the breathalyzer test hinges solely upon the law-enforcement officer having reasonable grounds to believe the person to have been operating a motor vehicle on the highway while under the influence of intoxicating liquor, and not upon the illegality of the arrest for that offense. In re Pinyatello, 36 N.C. App. 542, 245 S.E.2d 185 (1978).

Suspect Not Entitled to Drive Own Car to Test Site. — A person suspected of driving while under the influence who requests a prearrest chemical test pursuant to § 20-16.2(i) does not

have to be permitted to drive his own vehicle to the test site. Opinion of Attorney General to Chief P.L. McIver, Garner Police Department, Garner, N.C., 47 N.C.A.G. 89 (1977).

Option to Refuse Is Not Constitutionally Mandated. — This section only "coerces" a breathalyzer test in the limited instances in which the law-enforcement officer has reasonable grounds to believe that the driver has violated the law. In such situations the state could constitutionally require that the driver submit to an examination without any option to refuse. Montgomery v. North Carolina Dep't of Motor Vehicles, 455 F. Supp. 338 (W.D.N.C. 1978).

It is not impermissible nor a violation of equal protection of the laws for the State to allow drivers an option of refusing a breathalyzer examination that could be constitutionally required in exchange for risking license suspension of six months if the proper procedures are followed and the officer has probable cause to believe that the accused has driven a motor vehicle while under the influence of intoxicating liquor. Montgomery v. North Carolina Dep't of Motor Vehicles, 455 F. Supp. 338 (W.D.N.C. 1978).

The effect of subsection (a) of this section is to require a defendant to exercise his rights in a timely manner. State v. Lloyd, 33 N.C. App. 370, 235 S.E.2d 281 (1977).

Subsection (a) Complied with. — Having placed the information required by subsection (a) in writing before the defendant, the operator was not required to make defendant read it. The operator complied fully with the statute when he orally advised defendant and placed the required information in writing before defendant with the opportunity on defendant's part to read the same. State v. Carpenter, 34 N.C. App. 742, 239 S.E.2d 596 (1977).

Considering the 1973 amendments to subsections (a) and (c) of this section together it is clear that the modification in subsection (c) that changed the phrase "law-enforcement officer" to "arresting officer" was designed to distinguish between the law-enforcement officer with reasonable grounds to believe that the suspect was driving under the influence of alcohol, (i.e., the arresting officer) and the law-enforcement officer who is to administer the test and give the four-part warning. Oldham v. Miller, 38 N.C. App. 178, 247 S.E.2d 767 (1978).

Officers Authorized to Request a Test. — Subsection (c) of this section does not provide that the "arresting officer" is the sole person authorized to request that the petitioner submit to the test. The phrase "arresting officer" merely distinguishes between the two law-enforcement officers present at the administration of the test and makes it clear that the breathalyzer operator who gives the four-part warning set out in subsection (a) of this section is not the officer authorized to request that the petitioner take the test. Oldham v. Miller, 38 N.C. App. 178, 247 S.E.2d 767 (1978).

The full import of subsection (c) of this section requires an operator of a motor vehicle, who has been charged with the offense of driving under the influence of intoxicating liquor, to take a breathalyzer test, which means the person to be tested must follow the instructions of the breathalyzer operator. A failure to follow such instruction provides an adequate basis for the trial court to conclude that petititoner willfully refused to take a chemical test of breath in violation of law. Bell v. Powell, 41 N.C. App. 131, 254 S.E.2d 191 (1979).

Time Limitation on Right to Call Attorney. — The 30-minute time limitation in subsection (a)(4) refers only to the right to "select a witness," leaving § 15A-501(5) to control the time limitation on the right to "call an attorney" (i.e., a reasonable time). Price v. North Carolina Dep't of Motor Vehicles, 36 N.C. App. 698, 245 S.E.2d 518, appeal dismissed, 295 N.C. 551, 248 S.E.2d 728 (1978).

The breathalyzer test will be delayed a maximum of 30 minutes from the time defendant is notified of his rights. State v. Lloyd, 33 N.C. App. 370, 235 S.E.2d 281 (1977).

Section 15A-501(5) and this section give an accused a reasonable time to call an attorney and communicate with him but § 20-16.2(a)(4) gives an accused only 30 minutes to select a witness and secure his attendance at the breathalyzer test. Price v. North Carolina Dep't of Motor Vehicles, 36 N.C. App. 698, 245 S.E.2d 518, appeal dismissed, 295 N.C. 551, 248 S.E.2d 728 (1978).

If an accused, in addition to communicating with his lawyer, also desires that his lawyer function as a witness at the administration of the breathalyzer test, then the accused must bear the risk that the attorney/witness will not arrive within the 30-minute time limit. Price v. North Carolina Dep't of Motor Vehicles, 36 N.C. App. 698, 245 S.E.2d 518, appeal dismissed, 295 N.C. 551, 248 S.E.2d 728 (1978).

Although an accused has a reasonable time to communicate with counsel, he cannot delay the breathalyzer test for more than 30 minutes in waiting for his witness to arrive. Price v. North Carolina Dep't of Motor Vehicles, 36 N.C. App. 698, 245 S.E.2d 518, appeal dismissed, 295 N.C. 551, 248 S.E.2d 728 (1978).

The purpose of the 30-minute delay is to allow the defendant, who exercises his rights, a reasonable but limited amount of time to procure the presence of a lawyer, doctor, nurse or witness. State v. Lloyd, 33 N.C. App. 370, 235 S.E.2d 281 (1977).

Delay After Being Informed of Rights, etc. —

In accord with original. See Seders v. Powell, 39 N.C. App. 491, 250 S.E.2d 690 (1979).

Where petitioner's right to "call an attorney" was satisfied, petitioner had no right to delay the test in excess of 30 minutes while awaiting the arrival of his attorney. His declination to submit to the test was, therefore, a willful refusal under this section. Price v. North Carolina Dep't of Motor Vehicles, 36 N.C. App. 698, 245 S.E.2d 518, appeal dismissed, 295 N.C. 551, 248 S.E.2d 728 (1978).

Plaintiff had no right to delay the test in excess of 30 minutes while waiting for his attorney to return his call. His declination to take the breathalyzer test was thus a willful refusal under this section. Seders v. Powell, 39 N.C. App. 491, 250 S.E.2d 690 (1979).

Test Administered Whether or Not Requested Persons Have Arrived. — Even if the defendant does exercise his rights within 30 minutes of notification, the test can and will be administered after the lapse of 30 minutes regardless of whether the requested persons have arrived. State v. Lloyd, 33 N.C. App. 370, 235 S.E.2d 281 (1977).

The police are not required to delay testing unless the defendant exercises his rights. State v. Lloyd, 33 N.C. App. 370, 235 S.E.2d 281 (1977).

When Delay of Less Than 30 Minutes Permissible. — This section provides for a delay not in excess of 30 minutes for defendant to exercise his rights, and a delay of less than 30 minutes is permissible where the record is barren of any evidence to support a contention, if made, that a lawyer or witness would have arrived to witness the proceeding had the operator delayed the test to the maximum time of 30 minutes. State v. Buckner, 34 N.C. App. 447, 238 S.E.2d 635 (1977).

Subdivision (a)(4) of this section constitutes a maximum of 30 minutes delay for the defendant to obtain a lawyer or witness. It does not require that the administering officer wait 30 minutes before giving the test when the defendant has waived the right to have a lawyer or witness present or when it becomes obvious that defendant does not intend to exercise this right. State v. Buckner, 34 N.C. App. 447, 238 S.E.2d 635 (1977).

There was no error in the testing procedures or in the admission of the test results where there was a period of 25 minutes after notification to the defendant of his rights during which the defendant made no effort to exercise rights, and where, at the time the test was administered, the defendant made no effort to exercise his rights. State v. Lloyd, 33 N.C. App. 370, 235 S.E.2d 281 (1977).

A hearing under subsection (d) of this section satisfies the constitutional due process requirement. Montgomery v. North Carolina Dep't of Motor Vehicles, 455 F. Supp. 338 (W.D.N.C. 1978).

Subsection (d) of this section provides an adequate opportunity for a hearing prior to revocation of a license for failure to submit to a breathalyzer examination. Montgomery v. North Carolina Dep't of Motor Vehicles, 455 F. Supp. 338 (W.D.N.C. 1978).

Subsection (d) of this section makes no reference to any question concerning the legality of the arrest as coming within the scope of the inquiry. In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

The statutory distinction under this section is based on whether a motorist refuses to submit to a breath test. Since the motorist may not be subjected to such a test unless, pursuant to subsection (d) of this section, "the law-enforcement officer [has] reasonable grounds to believe the person had been driving or operating a motor vehicle upon a highway or public vehicular area while under the influence of intoxicating liquor," the State could have required that the motorist submit to the test without any refusal option and without any infringement of the constitutional rights against self-incrimination or against unreasonable searches and seizures. Montgomery v. North Carolina Dep't of Motor Vehicles, 455 F. Supp. 338 (W.D.N.C. 1978).

Failure of Trial Court to Find Facts. — While the failure of the trial court to find facts with regard to whether the plaintiff was arrested on reasonable grounds within the meaning of subsection (d) of this section, there was no need to remand for a further finding of facts or to award the plaintiff a new trial, since the facts leading up to the arrest were essentially uncontradicted, and only the conclusion to be drawn from them was disputed. Poag v. Powell, 39 N.C. App. 363, 250 S.E.2d 93, cert. denied, 296 N.C. 736, S.E.2d (1979).

Revocation for Refusal to Submit, etc. — The petitioner's driving privilege was properly revoked because of his unwillingness to take the breathalyzer test, whether or not his warrantless arrest was legal under § 15A-401, where the arrest was constitutionally valid by virtue of the fact that the arresting officer had ample information to provide him with probable cause to arrest the petitioner for operating a motor vehicle upon a public highway while under the influence of intoxicants. In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

The administrative punishment of license revocation is designed to promote breathalyzer examinations which provide the State law-enforcement officers with more accurate evidence of possible driving under the influence violations. Montgomery v. North Carolina Dep't of Motor Vehicles, 455 F. Supp. 338 (W.D.N.C. 1978).

The evidence sought from a breathalyzer examination is directly related to the State's need to enforce the laws governing the operation

of motor vehicles on the State's roads. The administrative penalty is appropriately designed to deny a right directly related to the laws whose enforcement may be hindered by refusal to take a breathalyzer examination. Montgomery v. North Carolina Dep't of Motor Vehicles, 455 F. Supp. 338 (W.D.N.C. 1978).

Revocation of a driver's license does not deprive the licensee of any fundamental constitutional right. Montgomery v. North Carolina Dep't of Motor Vehicles, 455 F. Supp. 338 (W.D.N.C. 1978).

Property Rights Not Denied. — Where plaintiff was arrested for driving under the influence of alcohol, refused to submit to a breathalyzer examination, and later received notice that his driver's license would be suspended, the plaintiff was not deprived of any property right without procedural due process although a notice of revocation was issued prior to a hearing, the plaintiff was provided a right to a hearing, before revocation was effectuated. In fact the plaintiff requested and received an administrative hearing, a trial de novo in superior court, and consideration of his appeals of the superior court's decision by both the North Carolina Court of Appeals and the North Carolina Supreme Court prior to actual revocation. Montgomery v. North Carolina Dep't of Motor Vehicles, 455 F. Supp. 338 (W.D.N.C. 1978).

Cited in Church v. Powell, 40 N.C. App. 254, 252 S.E.2d 229 (1979).

§ 20-17. Mandatory revocation of license by Division.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, ss. 20, 41, effective Jan. 1, 1981, will amend the introductory paragraph and subdivision (8) of this section to read as follows:

"**§ 20-17. Mandatory revocation of license by Division.** — The Division shall forthwith revoke the license of any driver upon receiving a record of such driver's conviction for any of the following offenses when such conviction has become final:

(8) Conviction of using a false or fictitious name or giving a false or fictitious address in any application for a driver's license, or learner's permit, or any renewal or duplicate thereof, or knowingly making a false statement or knowingly concealing a material fact or otherwise committing a fraud in any such application or procuring or knowingly permitting or allowing another to commit any of the foregoing acts."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-18. Conviction of offenses described in § 20-181 not ground for suspension or revocation.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 41, will amend this section to read as follows:

"**§ 20-18. Conviction of offenses described in § 20-181 not ground for suspension or revocation.** — Conviction of offenses described in G.S. 20-181 shall not be cause for the suspension or revocation of driver's license under the terms of this Article."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-19. Period of suspension or revocation.

(c1) When a license is revoked under subdivision (2) of G.S. 20-17, and the period of revocation is not determined by the provisions of G.S. 20-19(d) and (e), the period of revocation shall be one year unless the trial judge issues a limited driving privilege to the person convicted that contains a condition that the defendant successfully complete the course of instruction at an Alcohol and Drug Education Traffic School. If the trial judge issues a limited privilege and the person convicted complies with the conditions and restrictions included in the

limited privilege, the division must restore the person's license after six months if the person's license or limited driving privilege is not otherwise revoked or suspended, and if the division has received a certificate from the Alcohol and Drug Education Traffic School certifying that the person convicted has successfully completed the program of instruction at the Alcohol and Drug Education Traffic School. If the person fails to comply with the conditions and restrictions contained in the limited privilege, the period of revocation is 12 months, beginning at the time the limited privilege is revoked.

(d) When a license is revoked because of a second conviction for driving or operating a vehicle while under the influence of intoxicating liquor or while under the influence of an impairing drug, occurring within three years after a prior conviction, the period of revocation shall be four years; provided, that the Division may, after the expiration of two years, issue a new license upon satisfactory proof that the former licensee has not been convicted within the past two years with a violation of any provision of the motor vehicle laws, liquor laws or drug laws of North Carolina or any other state and is not an excessive user of alcohol or drugs and upon such terms and conditions which the Division may see fit to impose for the balance of said period of revocation; provided, that as to a license which has been revoked because of a second conviction for driving under the influence of intoxicating liquor or a narcotic drug prior to May 2, 1957, and which has not been restored, the Division may upon the application of the former licensee, and after the expiration of two years of such period of revocation, issue a new license upon satisfactory proof that the former licensee has not been convicted within the past two years with a violation of any provision of the motor vehicle laws, liquor laws or drug laws of North Carolina or any other state and is not an excessive user of alcohol or drugs. When a new license is issued pursuant to the provisions of this subsection, it may be issued upon such terms and conditions as the division may see fit to impose, including when feasible the condition that said former licensee successfully complete the program of instruction at an Alcohol and Drug Education Traffic School. The terms and conditions imposed by the division may be imposed for the balance of a four-year revocation, which period shall be computed from the date of the original revocation.

(e) When a license is revoked because of a third or subsequent conviction for driving or operating a vehicle while under the influence of intoxicating liquor or while under the influence of an impairing drug, occurring within five years after a prior conviction, the period of revocation shall be permanent; provided, that the Division may, after the expiration of three years, issue a new license upon satisfactory proof that the former licensee has not been convicted within the past three years with a violation of any provision of motor vehicle laws, liquor laws or drug laws of North Carolina or any other state and is not an excessive user of alcohol or drugs; provided, that as to a license which has been revoked because of a third or subsequent conviction for driving under the influence of intoxicating liquor or a narcotic drug prior to May 2, 1957, and which license has not been restored, the Division may, upon application of the former licensee and after the expiration of three years of such period of revocation, issue a new license upon satisfactory proof that the former licensee has not been convicted within the past three years with a violation of any provision of the motor vehicle laws, liquor laws or drug laws of North Carolina or any other state and is not an excessive user of alcohol or drugs. When a new license is issued under the provisions of this subsection, it may be issued upon such terms and conditions as the Division may see fit to impose, including when feasible the condition that the former licensee successfully complete the program of instruction at an Alcohol and Drug Education Traffic School. The terms and conditions imposed by the Division may not exceed a period of three years.

(1979, c. 903, ss. 4-6.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1980, added subsection (c1), deleted "and upon such terms and conditions which the Division may see fit to impose for the balance of a four-year revocation period, which period shall be computed from the date of the original revocation" at the end of the first sentence in subsection (d), added the last two sentences of subsection (d), and added "including when feasible the condition that the former licensee successfully complete the program of instruction at an Alcohol and Drug Education Traffic School" at the end of the second sentence of subsection (e).

As the other subsections were not changed by the amendment, only subsections (c1), (d) and (e) are set out.

Subsection (e) of this section, is not overbroad in violation of the Constitution since no conduct within the purview of the phrase "violation of liquor laws of North Carolina," including the commission of the crime of public drunkenness, is a constitutionally protected activity. In re Harris, 37 N.C. App. 590, 246 S.E.2d 532 (1978).

Subsection (e) Is Not Unconstitutionally Vague. — The phrase "liquor laws" in subsection (e) of this section, is not a term so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. In re Harris, 37 N.C. App. 590, 246 S.E.2d 532 (1978).

Legislative Intent. — The legislature fully intended to include the crime of public drunkenness in the phrase "violation of liquor laws of North Carolina" in subsection (e) of this section. In re Harris, 37 N.C. App. 590, 246 S.E.2d 532 (1978).

In enacting subsection (e) of this section, the legislature was demanding complete compliance with all laws governing the use of drugs, alcohol, and motor vehicles. In re Harris, 37 N.C. App. 590, 246 S.E.2d 532 (1978).

The power to issue, suspend or revoke a driver's license is vested exclusively in the Division of Motor Vehicles, subject to review by the superior court and, upon appeal, by the appellate division. Smith v. Walsh, 34 N.C. App. 287, 238 S.E.2d 157 (1977).

Under § 20-16(a)(10) and subsection (b) of this section, the discretionary authority to suspend petitioner's license for a period not exceeding 12 months was vested exclusively in the Division of Motor Vehicles. No discretionary power was conferred upon a superior court. Smith v. Walsh, 34 N.C. App. 287, 238 S.E.2d 157 (1977).

§ 20-20. Surrender of licenses.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, ss. 21 and 41, will amend this section to read as follows:

"**§ 20-20. Surrender of licenses.** — Whenever any driver's license issued by the Division is revoked or suspended under the terms of this Chapter, the licensee shall surrender to the Division all driver's licenses and duplicates thereof issued to him by the Division which are in his possession."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-21. No operation under foreign license during suspension or revocation in this State.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 41, will amend this section to read as follows:

"**§ 20-21. No operation under foreign license during suspension or revocation in this State.** — Any resident or nonresident whose driver's license or right or privilege to operate a motor vehicle in this State has been suspended or revoked as provided in this Article shall not operate a motor vehicle in this State under a license, permit or registration issued by another jurisdiction or otherwise during such suspension, or after such revocation until a new license is obtained when and as permitted under this Article."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-22. Suspending privileges of nonresidents and reporting convictions.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 41, effective Jan. 1, 1981, will amend subsection (a) of this section to read as follows:

"**§ 20-22. Suspending privileges of nonresidents and reporting convictions.** — (a) The privilege of driving a motor vehicle on the highways of this State given to a nonresident hereunder shall be subject to suspension or revocation by the Division in like manner and for like cause as a driver's license issued hereunder may be suspended or revoked."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-23. Suspending resident's license upon conviction in another state.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 22, will amend this section to read as follows:

"**§ 20-23. Suspending resident's license upon conviction in another state.** — The Division is authorized to suspend or revoke the license of any resident of this State upon receiving notice of the conviction as defined in G.S. 20-24(c) of such person in another state of the offenses hereinafter enumerated which, if committed in this State, would be grounds for the suspension or revocation of the license of an operator. The provisions of this section shall apply only for the offenses as set forth in G.S. 20-26(a)."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-23.1. Suspending or revoking operating privilege of person not holding license.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 41, will amend this section to read as follows:

"**§ 20-23.1. Suspending or revoking operating privilege of person not holding license.** — In any case where the Division would be authorized to suspend or revoke the license of a person but such person does not hold a license, the Division is authorized to suspend or revoke the operating privilege of such a person in like manner as it could suspend or revoke his license if such person held a driver's license, and the provisions of this Chapter governing suspensions, revocations, issuance of a license, and driving after license suspended or revoked, shall apply in the discretion of the Division in the same manner as if the license has been suspended or revoked."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-23.2. Suspension of license for conviction of traffic offense in federal court. — Upon receipt of notice of conviction in any court of the federal government sitting in North Carolina of the offense of driving or operating a vehicle while under the influence of intoxicating liquor or while under the influence of an impairing drug as defined in G.S. 20-19(h), the Division is authorized to revoke the driving privilege of the person convicted in the same manner as if such conviction had occurred in a court of this State. (1969, c. 988; 1971, c. 619, s. 11; 1975, c. 716, s. 5; 1979, c. 903, s. 12.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1980, deleted the former last sentence, which made this section applicable only to offenses committed on highways in federal parks in this State.

§ 20-24. When court to forward license to Division and report convictions.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 41, will amend this section to read as follows:

"§ 20-24. When court to forward license to Division and report convictions. — (a) Whenever any person is convicted of any offense for which this Article makes mandatory the revocation of the driver's license of such person by the Division, the court in which such conviction is had shall require the surrender to it of all drivers' licenses then held by the person so convicted and the court shall thereupon forward the same, together with a record of such conviction, to the Division within 30 days.

The clerks of court, assistant clerks of court and deputy clerks of court in which any person is convicted, and as a result thereof the revocation or suspension of the driver's license of such person is required under the provisions of this Chapter, are hereby designated as agents of the Division of Motor Vehicles for the purpose of receiving all drivers' licenses required to be surrendered under this section, and are hereby authorized to and shall give to such licensee a dated receipt for any such license surrendered, such receipt to be upon such form as may be approved by the Commissioner of Motor Vehicles. The original of such receipt shall be mailed forthwith to the Driver License Section of the Division of Motor Vehicles together with the driver's license. Any driver's license which has been surrendered and for which a receipt has been issued as herein required shall be revoked or suspended as the case may be as of the date shown upon the receipt issued to such person.

(b) Every court having jurisdiction over offenses committed under this Article, or any other law of this State regulating the operation of motor vehicles on highways, shall forward to the Division a record of the conviction of any person in said court for a violation of any [of] said laws, and may recommend the suspension of the driver's license of the person so convicted. Every court shall also forward to the Division a record of every conviction in which sentence is suspended on condition that the defendant not operate a motor vehicle for a period of time, and such report shall state the period of time for which such condition is imposed; provided that the punishment for the violation of this subsection shall be the same as provided in G.S. 20-7(o).

(c) For the purpose of this Article the term 'conviction' shall mean a final conviction. Also, for the purposes of this Article a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction. Also, a defendant shall be treated for the purposes of this Article as having been convicted of any offense under this Chapter as to which he:

(1) Has been served with process under Article 17, Criminal Process, Chapter 15A of the General Statutes;

(2) Has failed to appear upon due call of the case; and

(3) Has failed within 90 days thereafter to submit himself to the jurisdiction of the court to answer the charge.

In addition to the foregoing provisions and for the purpose of this Article, a third or subsequent prayer for judgment continued within any five-year period shall be considered as a final conviction and to this end all orders entering prayer for judgments continued entered by the courts shall be reported to the Division of Motor Vehicles.

(d) After November 1, 1935, no driver's license shall be suspended or revoked except in accordance with the provisions of this Article."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-25. Right of appeal to court.

Superior Court Is Not Vested with Discretionary Authority. — On appeal and hearing de novo in superior court, that court is not vested with discretionary authority. It makes judicial review of the facts, and if it finds that the license of petitioner is in fact and in law subject to suspension or revocation the order of the Division of Motor Vehicles must be affirmed. Smith v. Walsh, 34 N.C. App. 287, 238 S.E.2d 157 (1977).

Applied in Noyes v. Peters, 40 N.C. App. 763, 253 S.E.2d 584 (1979).

Cited in In re Harris, 37 N.C. App. 590, 246 S.E.2d 532 (1978).

§ 20-26. Records; copies furnished. — (a) The Division shall keep a record of test, proceedings and orders pertaining to all operator's and chauffeur's licenses

granted, refused, suspended or revoked. The Division shall keep records of convictions as defined in G.S. 20-24(c) occurring outside North Carolina only for the offenses of exceeding a stated speed limit of 55 miles per hour or more by more than 15 miles per hour, driving while license suspended or revoked, careless and reckless driving, engaging in prearranged speed competition, engaging willfully in speed competition, hit-and-run driving resulting in damage to property, unlawfully passing a stopped school bus, illegal transportation of intoxicating liquors, and the offenses included in G.S. 20-17.

(b) The Division shall furnish certified copies of license records required to be kept by subsection (a) of this section to State, county, municipal and court officials of this State for official use only, without charge. Provided a certified copy of such record may be transmitted via the police information network and that such copy shall be competent for the purpose of establishing the status of a person's operator's license and driving privilege without further authentication. The Attorney General and the Commissioner of Motor Vehicles are authorized to promulgate such rules and regulations as may be necessary to implement the provision of this subsection.

(1979, c. 903, ss. 9, 10.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1980, inserted "test" before "proceedings" in the first sentence of subsection (a), and added the proviso at the end of the first sentence, and the entire second sentence, of subsection (b).

As subsection (c) was not changed by the amendment, it is not set out.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 23, will amend this section to read as follows:

"**§ 20-26. Records; copies furnished.** — (a) The Division shall keep a record of test, proceedings and orders pertaining to all driver's licenses granted, refused, suspended or revoked. The Division shall keep records of convictions as defined in G.S. 20-24(c) occurring outside North Carolina only for the offenses of exceeding a stated speed limit of 55 miles per hour or more by more than 15 miles per hour, driving while license suspended or revoked, careless and reckless driving, engaging in prearranged speed competition, engaging willfully in speed competition, hit-and-run driving resulting in damage to property, unlawfully passing a stopped school bus, illegal transportation of intoxicating liquors, and the offenses included in G.S. 20-17.

(b) The Division shall furnish certified copies of license records required to be kept by subsection (a) of this section to State, county, municipal and court officials of this State for official use only, without charge. Provided a certified copy of such record may be transmitted via the police information network and that such copy shall be competent for the purpose of establishing the status of a person's operator's license and driving privilege without further authentication. The Attorney General and the Commissioner of Motor Vehicles are authorized to promulgate such rules and regulations as may be necessary to implement the provision of this subsection.

(c) The Division shall furnish copies of license records required to be kept by subsection (a) of this section to other persons, firms and corporations for uses other than official upon prepayment of the fee therefor, according to the following schedule:

(1) Limited extract copy of license record, for period up to three years $1.00

(2) Complete extract copy of license record 1.00

(3) Certified true copy of complete license record 3.00

All fees received by the Division under the provision of this subsection shall be paid into and become a part of the 'Highway Fund.' "

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

Division May Not Furnish Listings for Commercial Purposes. — The Division of Motor Vehicles is not required or permitted under the statutes to sell or furnish selective listings (i.e., by age, sex, etc.) in bulk or on computer tapes from the driver's license files for commercial purposes. Opinion of Attorney General to Mr. Zeb Hocutt, Jr., Director, Driver License Section, Division of Motor Vehicles, 47 N.C.A.G. 59 (1977).

§ 20-27. Availability of records. — (a) All records of the Division pertaining to application and to operator's and chauffeur's license, except the confidential

medical report referred to in G.S. 20-7, of the current or previous five years shall be open to public inspection at any reasonable time during office hours.

(b) All records of the division pertaining to chemical tests as provided in G.S. 20-16.2 shall be available to the courts as provided in G.S. 20-26(b). (1935, c. 52, s. 21; 1975, c. 716, s. 5; 1979, c. 903, s. 11.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1980, designated the existing paragraph as subsection (a) and added subsection (b).

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 24, effective Jan. 1, 1981, will amend subsection (a) of this section to read as follows:

"(a) All records of the Division pertaining to application and to drivers' licenses, except the confidential medical report referred to in G.S. 20-7, of the current or previous five years shall be open to public inspection at any reasonable time during office hours."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-28. Unlawful to drive while license suspended or revoked. — (a) Any person whose operator's or chauffeur's license has been suspended or revoked other than permanently, as provided in this Chapter, who shall drive any motor vehicle upon the highways of the State while such license is suspended or revoked shall be guilty of a misdemeanor and his license shall be suspended or revoked, as the case may be, for an additional period of one year for the first offense, two years for the second offense, and permanently for a third or subsequent offense.

Provided, however, any person whose license has been suspended or revoked under this section for 12 months may apply for a license after 90 days; any person whose license has been suspended or revoked under this section for two years may apply for a license after 12 months; any person whose license has been suspended or revoked under this section permanently may apply for a license after three years. Upon the filing of such application the Division may, with or without a hearing, issue a new license upon satisfactory proof that the former licensee has not been convicted within the suspension or revocation period of a violation of any provision of the motor vehicle laws, liquor laws or drug laws of North Carolina or any other state. The new license may be issued upon such terms and conditions as the Division may see fit to impose for the balance of the suspension or revocation period. When the suspension or revocation period is permanent the terms and conditions imposed by the Division may not exceed three years.

Upon conviction, a violator of this section shall be punished by a fine of not less than two hundred dollars ($200.00) or imprisonment in the discretion of the court not to exceed two years, or both; provided, however, the restoree of a suspended or revoked operator's or chauffeur's license who operates a motor vehicle upon the streets or highways of the State without maintaining financial responsibility as provided by law shall be punished as for operating without an operator's license.

(1979, c. 377, ss. 1, 2.)

Editor's Note. —

The 1979 amendment, effective October 1, 1979, substituted the present first paragraph of subsection (a) for the former second half of the first paragraph, governing issuance of a new license to one whose license had been suspended or revoked, and the former second paragraph, authorizing the Division to exercise its discretion to suspend or revoke for lesser periods than those prescribed.

As subsection (b) was not changed by the amendment, it is not set out.

For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 41, effective Jan. 1, 1981,

will amend subsection (a) of this section to read as follows:

"(a) Any person whose driver's license has been suspended or revoked other than permanently, as provided in this Chapter, who shall drive any motor vehicle upon the highways of the State while such license is suspended or revoked shall be guilty of a misdemeanor and his license shall be suspended or revoked, as the case may be, for an additional period of one year for the first offense, two years for the second offense, and permanently for a third or subsequent offense.

Provided, however, any person whose license has been suspended or revoked under this section for 12 months may apply for a license after 90 days; any person whose license has been suspended or revoked under this section for two years may apply for a license after 12 months; any person whose license has been suspended or revoked under this section permanently may apply for a license after three years. Upon the filing of such application the Division may, with or without a hearing, issue a new license upon satisfactory proof that the former licensee has not been convicted within the suspension or revocation period of a violation of any provision of the motor vehicle laws, liquor laws or drug laws of North Carolina or any other state. The new license may be issued upon such terms and conditions as the Division may see fit to impose for the balance of the suspension or revocation period. When the suspension or revocation period is permanent the terms and conditions imposed by the Division may not exceed three years.

Upon conviction, a violator of this section shall be punished by a fine of not less than two hundred dollars ($200.00) or imprisonment in the discretion of the court not to exceed two years, or both; provided, however, the restoree of a suspended or revoked driver's license who operates a motor vehicle upon the streets or highways of the State without maintaining financial responsibility as provided by law shall be punished as for operating without a driver's license."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

A violation of § 20-7 is not statutorily a lesser included offense of this section. State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

Double Jeopardy Bars Prosecution under This Section Where Defendant Already Pled Guilty to § 20-7. — The defendant could not be prosecuted for driving while his license was permanently revoked in violation of this section because of the prohibition against double jeopardy, where the defendant had previously pled guilty to driving without a license in violation of § 20-7 based upon the same event. While a violation of § 20-7 is not statutorily a lesser included offense of a violation of this section, under the "additional facts test" of double jeopardy when applied to the defendant's offenses, the two offenses were the same both in fact and in law since the evidence that the defendant was driving an automobile while his license had been permanently revoked would sustain a conviction for driving without a license. State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

Where the petitioner was convicted of violating this section the revocation of his license was mandatory, and the exercise of limited discretion by the division under subsection (a) of this section does not change the mandatory character of the revocation. Noyes v. Peters, 40 N.C. App. 763, 253 S.E.2d 584 (1979).

§ 20-28.1. Conviction of moving offense committed while driving during period of suspension or revocation of license; hearings upon recommendation of judge and district attorney.

(c) Any person whose driving privilege has been suspended or revoked under this section for 12 months may apply for a license after 90 days; any person whose license has been suspended or revoked under this section for two years may apply for a license after 12 months; any person whose license has been suspended or revoked under this section permanently may apply for a license after three years. Upon the filing of such application the Division may, with or without a hearing, issue a new license upon satisfactory proof that the former licensee has not been convicted within the suspension or revocation period of a violation of any provision of the motor vehicle laws, liquor laws, or drug laws of North Carolina or any other state. The new license may be issued upon such terms and conditions which the Division may see fit to impose for the balance of the suspension or revocation period. When the suspension or revocation period is permanent, the terms and conditions imposed by the Division may not exceed three years.

(d) Repealed by Session Laws 1979, c. 378, s. 2, effective October 1, 1979. (1965, c. 286; 1969, c. 348; 1971, c. 163; 1973, c. 47, s. 2; 1975, c. 716, s. 5; 1979, c. 378, ss. 1, 2.)

Editor's Note. —

The 1979 amendment, effective October 1, 1979, rewrote subsection (c), which formerly provided only for application for a new license after a permanent revocation of the license and provided only general guidelines for such a decision, and repealed former subsection (d), which authorized the judge and district attorney to recommend an investigation to see if a lesser suspension or revocation was warranted.

As subsections (a) and (b) were not changed by the amendment, they are not set out.

§ 20-29. Surrender of license.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 25, will amend this section to read as follows:

"**§ 20-29. Surrender of license.** — Any person operating or in charge of a motor vehicle, when requested by an officer in uniform, or, in the event of accident in which the vehicle which he is operating or in charge of shall be involved, when requested by any other person, who shall refuse to write his name for the purpose of identification or to give his name and address and the name and address of the owner of such vehicle, or who shall give a false name or address, or who shall refuse, on demand of such officer or such other person, to produce his license and exhibit same to such officer or such other person for the purpose of examination, or who shall refuse to surrender his license on demand of the Division, or fail to produce same when requested by a court of this State, shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this Article. Pickup notices for drivers' licenses or revocation or suspension of license notices and orders or demands issued by the Division for the surrender of such licenses may be served and executed by patrolmen or other peace officers, and such patrolmen and peace officers, while serving and executing such notices, orders and demands, shall have all the power and authority possessed by peace officers when serving and executing warrants charging violations of the criminal laws of the State."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

Stop of Defendant in Private Driveway Is "Seizure" within Fourth Amendment. — Where a patrolman, while not engaged in any patrol of the highway for purposes of observing traffic or making random license checks, spontaneously decided to stop petitioner, not while petitioner was "on a public highway" nor while petitioner was operating a vehicle, but instead while petitioner was in a private driveway, although petitioner would have had a meritorious defense to any prosecution based on failure to display his license, he was not entitled to invoke self-help against what was, at the time, an arguably lawful arrest, and petitioner's conviction for assaulting the highway patrolman can survive despite the finding that the officer's initial stop and demand were illegal as an unreasonable search and seizure under the Fourth Amendment. Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

§ 20-29.1. Commissioner may require reexamination; issuance of limited or restricted licenses.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, ss. 26 and 41, will amend this section to read as follows:

"**§ 20-29.1. Commissioner may require reexamination; issuance of limited or restricted licenses.** — The Commissioner of Motor Vehicles, having good and sufficient cause to believe that a licensed operator is incompetent or otherwise not qualified to be licensed, may, upon written notice of at least five days to such licensee, require him to submit to a reexamination to determine his competency to operate a motor vehicle. Upon the conclusion of such examination, the Commissioner shall take such action as may be appropriate, and may suspend or revoke the license of such person or permit him to retain such license, or may issue a license subject to restrictions or upon failure of such reexamination may cancel the license of such person until he passes a reexamination. Refusal or neglect of the licensee to submit to such reexamination shall be grounds for the cancelation of the license of the person failing to be reexamined, and the license so canceled shall remain canceled until such person satisfactorily complies with the reexamination requirements

of the Commissioner. The Commissioner may, in his discretion and upon the written application of any person qualified to receive a driver's license, issue to such person a driver's license restricting or limiting the licensee to the operation of a single prescribed motor vehicle or to the operation of a particular class or type of motor vehicle. Such a limitation or restriction shall be noted on the face of the license, and it shall be unlawful for the holder of such limited or restricted license to operate any motor vehicle or class of motor vehicle not specified by such restricted or limited license, and the operation by such licensee of motor vehicles not specified by such license shall be deemed the equivalent of operating a motor vehicle without any driver's license. Any such restricted or limited licensee may at any time surrender such restricted or limited license and apply for and receive an unrestricted driver's license upon meeting the requirements therefor."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-30. Violations of license or learner's permit provisions. — It shall be unlawful for any person to commit any of the following acts:

(7) To sell or offer for sale any reproduction or facsimile or simulation of an operator's or chauffeur's license or learner's permit. The provisions of this subsection shall not apply to agents or employees of the Division while acting in the course and scope of their employment. Any person, firm or corporation violating the provisions of this subsection shall be guilty of a felony, and shall be punished by a fine of not less than five hundred dollars ($500.00) and not more than five thousand dollars ($5,000), imprisonment for not more than three years or both such fine and imprisonment. (1935, c. 52, s. 24; 1951, c. 542, s. 4; 1967, c. 1098, s. 1; 1973, c. 18, s. 2; 1975, c. 716, s. 5; 1979, c. 415.)

Editor's Note. —

The 1979 amendment added subdivision (7).

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (7) are set out.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, ss. 27 and 41, will amend this section to read as follows:

"**§ 20-30. Violations of license or learner's permit provisions.** — It shall be unlawful for any person to commit any of the following acts:

(1) To display or cause to be displayed or to have in possession a driver's license or learner's permit, knowing the same to be fictitious or to have been canceled, revoked, suspended or altered.

(2) To counterfeit, sell, lend to, or knowingly permit the use of, by one not entitled thereto, a driver's license or learner's permit.

(3) To display or to represent as one's own a license or learner's permit not issued to the person so displaying same.

(4) To fail or refuse to surrender to the Division upon demand any driver's license or learner's permit that has been suspended, canceled or revoked as provided by law.

(5) To use a false or fictitious name or give a false or fictitious address in any application for a driver's license or learner's permit, or any renewal or duplicate thereof, or knowingly to make a false statement or knowingly conceal a material fact or otherwise commit a fraud in any such application, or for any person to procure, or knowingly permit or allow another to commit any of the foregoing acts. Any license or learner's permit procured as aforesaid shall be void from the issuance thereof, and any moneys paid therefor shall be forfeited to the State.

(6) To photostat or otherwise reproduce a driver's license or learner's permit or to possess a driver's license or learner's permit which has been photostated or otherwise reproduced, unless such photostat or other reproduction was authorized by the Commissioner.

(7) To sell or offer for sale any reproduction or facsimile or simulation of an operator's or chauffeur's license or learner's permit. The provisions of this subsection shall not apply to agents or employees of the Division while acting in the course and scope of their employment. Any person, firm or corporation violating the provisions of this subsection shall be guilty of a felony, and shall be punished by a fine of not less than five hundred dollars ($500.00) and not more than five thousand dollars ($5,000), imprisonment for not more than three years or both such fine and imprisonment."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-33: Repealed by Session Laws 1979, c. 667, s. 28, effective January 1, 1981.

§ 20-34.1. Unlawful to issue licenses for anything of value except prescribed fees.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 41, will amend this section to read as follows:

"**§ 20-34.1. Unlawful to issue licenses for anything of value except prescribed fees.** — It shall be unlawful for any employee of the Division of Motor Vehicles to charge or accept any money or other thing of value except the fees prescribed by law for the issuance of a driver's license, and the fact that the license is not issued after said employee charges or accepts money or other thing of value shall not constitute a defense to a criminal action under this section. In a prosecution under this section it shall not be a defense to show that the person giving the money or other thing of value or the person receiving the license or intended to receive the same is entitled to a license under the Uniform Driver's License Act. Any person violating this section shall be guilty of a felony and upon conviction shall be punished by imprisonment in the State's prison for not more than five years or by a fine of not more than five thousand dollars ($5,000) or by both such fine and imprisonment."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-37. Limitations on issuance of licenses.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 41, will amend this section to read as follows:

"**§ 20-37. Limitations on issuance of licenses.** — There shall be no driver's license issued within this State other than that provided for in this Article, nor shall there be any other examination required: Provided, however, that cities and towns shall have the power to license, regulate and control drivers and operators of taxicabs within the city or town limits and to regulate and control operators of taxicabs operating between the city or town to points, not incorporated, within a radius of five miles of said city or town."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

ARTICLE 2A.

Afflicted, Disabled or Handicapped Persons.

§ 20-37.1. Motorized wheelchairs or similar vehicles.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 29, will amend this section to read as follows:

"**§ 20-37.1. Motorized wheelchairs or similar vehicles.** — Any afflicted or disabled person who is qualified to operate a motorized wheelchair or other similar vehicle not exceeding 1,000 pounds gross weight, may apply to the Division of Motor Vehicles for a special driver's license and permanent registration plates. When it is made to appear to the satisfaction of the Division of Motor Vehicles that the applicant is qualified to operate such vehicle, and is dependent upon such vehicle as a means of conveyance or as a means of earning a livelihood, said Division shall, upon the payment of a license fee of one dollar ($1.00) for each such motor vehicle, issue to such applicant for his exclusive personal use a special vehicle driver's license, which shall be renewed annually upon the payment of a fee of fifty cents

(50¢), and permanent registration plates for such vehicle. The initial one dollar ($1.00) fee required by this section shall be in full payment of the permanent registration plates issued for such vehicle and such plates need not thereafter be renewed and such plates shall be valid only on the vehicle for which issued and then only while such vehicle is owned by the person to whom the plates were originally issued.

Any person other than the licensee who shall operate any motor vehicle equipped with any such special license plate as is authorized by this section shall be guilty of a misdemeanor and upon conviction subject to punishment in the discretion of the court."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-37.6. Handicapped; drivers and passengers; parking privileges. — (a) Any vehicle driven by or transporting a person who is handicapped as defined by G.S. 20-37.5 or transporting a person who is visually impaired as defined by G.S. 111-11, as certified by a licensed ophthalmologist, optometrist, or Division of Services for the Blind, may be parked for unlimited periods in parking zones restricted as to length of time parking is permitted. This provision has no application to those zones or during times in which the stopping, parking, or standing of all vehicles is prohibited or which are reserved for special types of vehicles. Any qualifying vehicle may park in spaces designated by aboveground markings as restricted to vehicles distinguished as being driven by or as transporting the handicapped or as transporting the visually impaired.

(b) Handicapped Car Owners; Distinguishing License Plates. — If the handicapped or visually impaired person is a registered owner of a vehicle, this vehicle may display a distinguishing license plate. This license plate shall be issued for the normal fee applicable to standard license plates. Any vehicle owner who qualifies for a distinguishing license plate may also receive up to two distinguishing placards as provided for in G.S. 20-37.6(c).

(c) Handicapped Drivers and Passengers; Distinguishing Placards. — A person who is either handicapped or visually impaired may apply for issuance of a distinguishing placard to be designed by the Division of Motor Vehicles of the Department of Transportation, in cooperation with the Office for the Handicapped of the Department of Insurance. Any organization which, as determined and certified by the State Vocational Rehabilitation Agency, regularly transports handicapped or visually impaired people, may also apply. The placard shall be at least 6 inches by 12 inches in size and shall contain all the information the Division of Motor Vehicles deems necessary for purpose of designation and enforcement. The placard shall be displayed on the driver's side of the dashboard of a vehicle only when the vehicle is being driven by a duly licensed handicapped driver or is being used to transport handicapped or visually impaired passengers. When the placard is properly displayed, all parking rights and privileges extended to vehicles displaying a distinguishing license plate issued pursuant to G.S. 20-37.6(b) shall apply. The Division of Motor Vehicles shall establish procedures for the issuance of the distinguishing placards, may charge a fee sufficient to pay the actual cost of issuance. Two placards may be issued to an applicant on request. Applicants who are organizations may receive one placard for each transporting vehicle.

(d) Designation of Parking Places. — Designation of parking spaces for the physically handicapped and the visually impaired on streets and in other areas, including public vehicular areas specified in G.S. 20-4.01(32), shall be by the use of sign R7-8, Manual on Uniform Traffic Control Devices. Nonconforming signs in use prior to July 1, 1979, shall not constitute a violation during their useful lives, which shall not be extended by other means than normal maintenance.

(e) Enforcement of Handicapped Parking Privileges. — It shall be unlawful:

(1) To park or leave standing any vehicle in a space designated for handicapped or visually impaired persons when the vehicle does not

display the distinguishing license plate or placard as provided in this section;

(2) For any person not qualifying for the rights and privileges extended to handicapped or visually impaired persons under this section to exercise or attempt to exercise such rights or privileges by the unauthorized use of a distinguishing license plate or placard issued pursuant to the provisions of this section;

(3) To park or leave standing any vehicle so as to obstruct a curb ramp or curb cut for handicapped persons as provided for by North Carolina Building Code or as designated in G.S. 136-44.14;

(4) For those responsible for designating parking spaces for the handicapped to erect or otherwise use signs not conforming to G.S. 20-37.6(e) for this purpose.

This section is enforceable in all public vehicular areas specified in G.S. 20-4.01(32).

(f) Penalties for violation.

(1) The penalty for a violation of G.S. 20-37.6(e)(1), (2) and (3) shall be ten dollars ($10.00) and whenever evidence shall be presented in any court of the fact that any automobile, truck, or other vehicle was found to be parked in a properly designated handicapped parking space in violation of the provisions of this section, it shall be prima facie evidence in any court in the State of North Carolina that the vehicle was parked and left in the space by the person, firm, or corporation in whose name the vehicle is registered and licensed according to the records of the Division of Motor Vehicles. No evidence tendered or presented under this authorization shall be admissible or competent in any respect in any court or tribunal except in cases concerned solely with a violation of this section.

(2) The penalty for violation of G.S. 20-37.6(e)(4) shall be fifty dollars ($50.00) and whenever evidence shall be presented in any court of the fact that any such nonconforming sign or markings are being used it shall be prima facie evidence in any court in the State of North Carolina that the person, firm, or corporation with ownership of the property where said nonconforming signs or markings are located is responsible for violation of this section. Building inspectors and others responsible for North Carolina State Building Code violations specified in G.S. 143-138(h) where such signs are required by the Handicapped Section of the North Carolina State Building Code, may cause a citation to be issued for this violation and may also initiate any appropriate action or proceeding to correct such violation.

(3) A law enforcement officer, including security officer who has authority to enforce laws on the property of his employer as specified in Chapter 74A, may cause a vehicle parked in violation of this section to be towed; and such officer shall be a legal possessor as provided in G.S. 20-161(d)(2). This law enforcement officer, or security officer, shall not be held to answer in any civil or criminal action to any owner, lienholder or other person legally entitled to the possession of any motor vehicle removed from such space pursuant to this section, except where such motor vehicle is willfully, maliciously, or negligently damaged in the removal from aforesaid space to place of storage.

(4) Notwithstanding any other provision of the General Statutes, the provisions of this section relative to handicapped parking shall be enforced by State, county, city and other municipal authorities in their respective jurisdictions whether on public or private property in the same manner as is used to enforce other parking laws and ordinances by said agencies. (1971, c. 374, s. 1; 1973, cc. 126, 1384; 1977, c. 340, s. 2; 1979, c. 632.)

Editor's Note. —
Session Laws 1979, c. 632, effective July 1, 1979, rewrote this section to read as set out above.

Session Laws 1979, c. 178, ss. 1, 3 and 4, effective July 1, 1979, which amended this section as it stood before the enactment of c. 632, were repealed by Session Laws 1979, c. 812.

ARTICLE 2B.

Special Identification Cards for Nonoperators.

§ 20-37.7. Special identification card.

(f) The Division of Motor Vehicles shall maintain information pertaining to the recipients of a special identification card and such indices as deemed appropriate, but such information shall not be required to be computerized. The Division may promulgate any rules and regulations it deems necessary for the effective implementation of the provisions of this section.
(1979, c. 469.)

Editor's Note. —
The 1979 amendment, effective October 1, 1979, deleted "hard copies of applications and" after "shall maintain" in the first sentence of subsection (f).

As the rest of the section was not changed by the amendment, only subsection (f) is set out.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 30, effective Jan. 1, 1981, will amend subsection (d) to read as follows:

"(d) A special identification card shall not expire but may be reissued. The fee for the issuance or reissuance of a special identification card shall be one dollar ($1.00) and shall be placed in the "Highway Fund" for use as provided in G.S. 20-7(j)."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-37.8. Fraudulent use prohibited. — (a) It shall be unlawful for any person to use a false or fictitious name or give a false or fictitious address in any application for a special identification card or knowingly to make a false statement or knowingly conceal a material fact or otherwise commit a fraud in any such application or to obtain or possess more than one such card for a fraudulent purpose or knowingly to permit or allow another to commit any of the foregoing acts.
(b) A violation of this section shall constitute a misdemeanor. (1979, c. 603, s. 1.)

Cross Reference. — Provision for punishment for misdemeanor when not otherwise specified, see § 14-3.

Editor's Note. — Session Laws 1979, c. 603, s. 2, makes this section effective October 1, 1979.

ARTICLE 3.

Motor Vehicle Act of 1937.

Part 2. Authority and Duties of Commissioner and Division.

§ 20-42. Authority to administer oaths and certify copies of records.
(b) The Commissioner and such officers of the Division as he may designate are hereby authorized to prepare under the seal of the Division and deliver upon

request a certified copy of any record of the Division, charging a fee of two dollars ($2.00) for each document so certified, and every such certified copy shall be admissible in any proceeding in any court in like manner as the original thereof, without further certification. Provided that any copy of any record of the Division furnished to State, county, municipal and court officials of this State for official use shall be furnished without charge. (1937, c. 407, s. 7; 1955, c. 480; 1961, c. 861, s. 1; 1967, c. 691, s. 41; c. 1172; 1971, c. 749; 1975, c. 716, s. 5; 1977, c. 785; 1979, c. 801, s. 7.)

Editor's Note. —
The 1979 amendment, effective July 1, 1979, substituted "two dollars ($2.00)" for "one dollar ($1.00)" in the first sentence of subsection (b).

As subsection (a) was not changed by the amendment, it is not set out.

§ 20-46: Repealed by Session Laws 1979, c. 99.

§ 20-49. Police authority of Division. — The Commissioner and such officers and inspectors of the Division as he shall designate and all members of the Highway Patrol shall have the power:

(8) To investigate reported thefts of motor vehicles, trailers and semitrailers and make arrest for thefts thereof.

(1979, c. 93.)

Editor's Note. —
The 1979 amendment added "and make arrest for thefts thereof" at the end of subdivision (8).

As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (8) is set out.

Controlled substances, found inside a paper bag at the scene of an automobile accident, were not the products of an unreasonable search and seizure in violation of the defendant's Fourteenth Amendment rights where, under the circumstances, it was reasonable for a state trooper to look inside the paper bag to determine whether there was anything valuable belonging to the owner that the trooper should hold for safekeeping. State v. Francum, 39 N.C. App. 429, 250 S.E.2d 705 (1979).

Part 3. Registration and Certificates of Titles of Motor Vehicles.

§ 20-50. Owner to secure registration and certificate of title; temporary registration markers.

Editor's Note. —
For a note discussing the extension of the family purpose doctrine to motorcycles and private property, see 14 Wake Forest L. Rev. 699 (1978).

§ 20-50.1: Repealed by Session Laws 1979, c. 574, s. 5, effective July 1, 1979.

Cross Reference. — For present provisions covering the subject matter of the repealed section, see § 20-51, subdivision (9).

§ 20-51. Exempt from registration. — The following shall be exempt from the requirement of registration and certificate of title:

(9) Mo-peds as defined in G.S. 20-4.01(27)d1. (1937, c. 407, s. 16; 1943, c. 500; 1949, c. 429; 1951, c. 705, s. 2; 1953, c. 826, ss. 2, 3; c. 1316, s. 1; 1961, cc. 334, 817; 1963, c. 145; 1965, c. 1146; 1971, c. 107; 1973, cc. 478, 757, 964; 1979, c. 574, s. 6.)

Editor's Note. — The 1979 amendment, effective July 1, 1979, added subdivision (9).

As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (9) are set out.

§ 20-57. Division to issue certificate of title and registration card.

(b) The registration card shall be delivered to the owner and shall contain upon the face thereof the name and address of the owner, space for owner's signature, the registration number assigned to the vehicle, and such description of the vehicle as determined by the Commissioner, provided that if there are more than two owners the Division may show only two owners on the registration card and indicate that additional owners exist by placing after the names listed "et al." Upon application to the Division, the registered owner may acquire additional copies of the registration card at a fee of one dollar ($1.00) each.

(1979, c. 139.)

Editor's Note. —

The 1979 amendment, effective July 1, 1979, substituted "one dollar ($1.00)" for "fifty cents (50¢)" near the end of the second sentence of subsection (b).

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 20-58. Perfection by indication of security interest on certificate of title. — Except as provided in G.S. 20-58.8, a security interest in a vehicle of a type for which a certificate of title is required shall be perfected only as hereinafter provided.

(1) If the vehicle is not registered in this State, the application for notation of a security interest shall be the application for certificate of title provided for in G.S. 20-52.

(2) If the vehicle is registered in this State, the application for notation of a security interest shall be in the form prescribed by the Division, signed by the debtor, and contain the date of application of each security interest, and name and address of the secured party from whom information concerning the security interest may be obtained. The application must be accompanied by the existing certificate of title unless in the possession of a prior secured party. If there is an existing certificate of title issued by this or any other jurisdiction in the possession of a prior secured party, the application for notation of the security interest shall in addition contain the name and address of such prior secured party. An application for notation of a security interest may be signed by the secured party instead of the debtor when the application is accompanied by documentary evidence of the applicant's security interest in that motor vehicle signed by the debtor and by affidavit of the applicant stating the reason the debtor did not sign the application. In the event the certificate cannot be obtained for recordation of the security interest, when title remains in the name of the debtor, the Division shall cancel the certificate and issue a new certificate of title listing all the respective security interests.

(3) If the application for notation of security interest is made in order to continue the perfection of a security interest perfected in another jurisdiction, it may be signed by the secured party instead of the debtor. Such application shall be accompanied by documentary evidence of a perfected security interest. No such application shall be valid unless an application for a certificate of title has been made in North Carolina. The security interest perfected herein shall be subject to the provisions

set forth in G.S. 20-58.5. (1937, c. 407, s. 22; 1955, c. 554, s. 2; 1961, c. 835, s. 6; 1969, c. 838, s. 1; 1975, c. 716, s. 5; 1979, c. 145, ss. 1, 2; c. 199.)

Editor's Note. —
The first 1979 amendment, effective July 1, 1979, substituted "and contain the date of application of each security interest" for "and containing the amount, date and nature of the security agreement" in the first sentence of subdivision (2) and deleted "it is" after "unless" in the second sentence of that subdivision. The last sentence was added to subdivision (3).

The second 1979 amendment, effective July 1, 1979, added the final two sentences to subdivision (2).

§ 20-58.1. Duty of the Division upon receipt of application for notation of security interest. — (a) Upon receipt of an application for notation of security interest, the required fee and accompanying documents required by G.S. 20-58, the Division, if it finds the application and accompanying documents in order, shall either endorse upon the certificate of title or issue a new certificate of title containing, the name and address of each secured party, and the date of perfection of each security interest as determined by the Division. The Division shall deliver or mail the certificate to the first secured party named in it and shall also notify the new secured party that his security interest has been noted upon the certificate of title.
(1961, c. 835, s. 6; 1969, c. 838, s. 1; 1975, c. 716, s. 5; 1979, c. 145, s. 3.)

Editor's Note. —
The 1979 amendment, effective July 1, 1979, deleted "the amount of each security interest," after "secured party" in the first sentence of subsection (a).

As subsection (b) was not changed by the amendment, it is not set out.

§ 20-58.5. Duration of security interest in favor of corporations which dissolve or become inactive. — Any security interest recorded in favor of a corporation which, since the recording of such security interest, has dissolved or become inactive for any reason, and which remains of record as a security interest of such corporation for a period of more than three years from the date of such dissolution or becoming inactive, shall become null and void and of no further force and effect. (1961, c. 835, s. 6; 1969, c. 838, s. 1; 1979, c. 145, s. 4.)

Cross Reference. — As to perfection of security interest by indication on title certificate, see § 20-58.

Editor's Note. — The 1979 amendment, effective July 1, 1979, deleted "firm or" after "of a," substituted "or become inactive" for "ceased to do business, or gone out of business," deleted "firm or" after "interest of such" and substituted "such dissolution or becoming inactive" for "the recording thereof."

§ 20-63. Registration plates to be furnished by the Division; requirements; surrender and reissuance; displaying; preservation and cleaning; alteration or concealment of numbers; commission contracts for issuance.
(d) Registration plates issued for a motor vehicle other than a motorcycle, trailer, or semitrailer shall be attached thereto, one in the front and the other in the rear: Provided, that when only one registration plate is issued for a motor vehicle other than a truck-tractor, said registration plate shall be attached to the rear of the motor vehicle. The registration plate issued for a truck-tractor shall be attached to the front thereof. Provided further, that when only one registration plate is issued for a motor vehicle and this motor vehicle is transporting a substance that may adhere to the plate so as to cover or discolor the plate or if the motor vehicle has a mechanical loading device that may damage the plate, the registration plate may be attached to the front of the motor vehicle.

(h) Commission Contracts for Issuance of Plates and Certificates. — All registration plates, registration certificates and certificates of title issued by the Division, outside of those issued from the Raleigh offices of the said Division and those issued and handled through the United States mail, shall be issued insofar as practicable and possible through commission contracts entered into by the Division for the issuance of such plates and certificates in localities throughout North Carolina with persons, firms, corporations or governmental subdivisions of the State of North Carolina and the Division shall make a reasonable effort in every locality, except as hereinbefore noted, to enter into a commission contract for the issuance of such plates and certificates and a record of these efforts shall be maintained in the Division. In the event the Division is unsuccessful in making commission contracts as hereinbefore set out it shall then issue said plates and certificates through the regular employees of the Division. Whenever registration plates, registration certificates and certificates of title are issued by the Division through commission contract arrangements, the Division shall provide proper supervision of such distribution. Commission contracts entered into hereunder shall provide for the payment of compensation at a rate per transaction as may be set by the General Assembly. Nothing contained in this subsection will allow or permit the operation of fewer outlets in any county in this State than are now being operated. (1937, c. 407, s. 27; 1943, c. 726; 1951, c. 102, ss. 1-3; 1955, c. 119, s. 1; 1961, c. 360, s. 4; c. 861, s. 2; 1963, c. 552, s. 6; c. 1071; 1965, c. 1088; 1969, c. 1140; 1971, c. 945; 1973, c. 629; 1975, c. 716, s. 5; 1979, c. 604, s. 1; c. 917, s. 4.)

Editor's Note. —

The first 1979 amendment, effective October 1, 1979, added the final sentence to subsection (d).

The second 1979 amendment, effective July 1, 1979, substituted "transaction" for "registration plate" in the next-to-last sentence of subsection (h).

Session Laws 1975, 2nd Sess., c. 983, s. 93, as amended by Session Laws 1979, c. 917, s. 1, provides: "The commission contract rate under G.S. 20-63(h) shall be forty-five cents (45¢) per transaction, for fiscal year 1979-80, and fifty cents (50¢) per transaction for fiscal year 1980-81. The latter rate shall continue past June 30, 1981, until the rate is changed by the General Assembly."

As the rest of the section was not changed by the amendment, only subsections (d) and (h) are set out.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 470, s. 1, effective Jan. 1, 1981, will amend subsection (b) to read:

"(b) Every license plate shall have displayed upon it the registration number assigned to the vehicle for which it is issued, also the name of the State of North Carolina, which may be abbreviated, the year number for which it is issued or the date of expiration, and, if the plate is issued for a commercial vehicle, as defined in G.S. 20-4.2(1), the word 'comercial,' designating 'commercial vehicle.' Provided such plates bearing the word 'commercial' shall not be issued for trailers or vehicles licensed for less than 5,000 pounds."

§ 20-65. Expiration of registration. — Every vehicle registration under this Article and every registration card and registration plate issued hereunder shall expire at midnight on the thirty-first day of December of each year: Provided, however, that it shall not be unlawful to continue to operate any vehicle upon the highways of this State after the expiration of the registration of said vehicle, registration card and registration plate during the period between the thirty-first day of December and the twenty-eighth day of February, inclusive, if the license plate is registered to the vehicle on which it is being used prior to the thirty-first day of December. (1937, c. 407, s. 29; 1943, c. 592, s. 1; 1955, c. 554, s. 3; 1961, c. 360, s. 6; 1979, c. 40, s. 1.)

Editor's Note. — Session Laws 1979, c. 40, s. 1, amended this section by substituting "twenty-eighth day of February" for "fifteenth day of February" in the proviso.

Section 2 of the 1979 act provided: "This act shall only apply to the operation of vehicles for which the registration expires December 31, 1978."

Section 3 of the amendatory act made it effective upon ratification and provided that it should expire March 1, 1979.

Amendment Effective July 1, 1980. — Session Laws 1979, c. 160, s. 1, effective July 1, 1980, will amend this section by designating the existing section as subsection (a), adding "with the exception of private passenger vehicles and all private hauler vehicles licensed for 4000 pounds gross weight," after "Article" near the beginning of the subsection, and adding subsections (b), (c),(d) and (e), which will read as follows:

"**§ 20-65. Expiration of registration.** — (a) Every vehicle registration under this Article with the exception of private passenger vehicles and all private hauler vehicles licensed for 4000 pounds gross weight, and every registration card and registration plate issued hereunder shall expire at midnight on the 31st day of December each year: Provided, however, that it shall not be unlawful to continue to operate any vehicle upon the highways of this State after the expiration of the registration of said vehicle, registration card and registration plate during the period between the 31st day of December and the 15th day of February, inclusive, if the license plate is registered to the vehicle on which it is being used prior to the 31st day of December.

(b) All private passenger vehicles and all private hauler vehicles licensed for 4000 pounds gross weight initially registered or re-registered in this State during July 1 — December 31, 1980, shall be registered so as to expire on June 30, 1981, and be inclusive of the month in which registration takes place. Registration fees will be computed on a monthly basis at a rate of one-twelfth of the applicable annual fee plus driver's education fee of three dollars ($3.00) per each registration transaction.

(c) Beginning January 1, 1981, all previously registered private passenger vehicles and all private hauler vehicles, licensed for 4000 pounds gross weight scheduled for renewal shall be registered for a period of time so as to equally distribute the subsequent annual registering of these vehicles uniformly throughout the nine months of March, April, May, July, August, September, October, November, and December, expiring the last day of the month for which the monthly sticker is issued. During the initial staggering of registrations, the Commissioner may designate registration periods of from 7 to 17 months and charge monthly fees accordingly. Monthly registration fees for implementing staggered registration shall be computed at a rate of one-twelfth of the applicable annual fee to the nearest twenty-five cents (25¢) plus the driver's education fee of three dollars ($3.00) for each registration transaction. Subsequent renewals of all passenger vehicles and private hauler vehicles licensed for 4000 pounds gross weight shall be for a period of 12 full months. Expiration date shall be the last day of the month for which such monthly sticker is issued. Prorated fees will be eliminated for private passenger vehicles and all private hauler vehicles licensed for 4000 pounds gross weight.

(d) Beginning on January 1, 1981, (for private passenger vehicles and all private hauler vehicles licensed for 4000 pounds gross weight only) all new, out-of-state registrants and reissues shall register for a full 12 months inclusive of the month of registration.

(e) In order to maintain a balanced flow of registration transactions, the Commissioner shall have the authority to assign registrants to months with low registration volumes. Registration fees in excess of 12 months may be charged in this case and will be based on monthly rates."

Session Laws 1979, c. 160, s. 2, effective July 1, 1980, provides: "All registrations of private passenger vehicles and private hauler vehicles licensed for 4000 pounds gross weight during the period from January 1, 1980, through June 30, 1980, shall expire at midnight on December 31, 1980, provided, however, that it shall not be unlawful to continue to operate such vehicles upon the highways of this State between January 1, 1981, and February 15, 1981, inclusive if the license plate is registered to the vehicle on which it is being used prior to January 1, 1981."

§ 20-67. Notice of change of address or name. — (a) Whenever any person, after making application for or obtaining the registration of a vehicle or a certificate of title, shall move from the address named in the application or shown upon a registration card or certificate of title, such person shall within 30 days thereafter notify the Division in writing of his old and new addresses.

(b) Whenever the name of any person who has made application for or obtained the registration of a vehicle or a certificate of title is thereafter changed by marriage or otherwise, such person shall thereafter forward or cause to be forwarded to the Division the certificate of title and to make application for correction of the certificate on forms provided by the Division. (1937, c. 407, s. 31; 1955, c. 554, s. 4; 1975, c. 716, s. 5; 1979, c. 106.)

Editor's Note.
The 1979 amendment substituted "30" for "10" near the end of subsection (a).

§ 20-71. Altering or forging certificate of title, registration card or application, a felony; reproducing or possessing blank certificate of title.
(b) It shall be unlawful for any person with fraudulent intent to reproduce or possess a blank North Carolina certificate of title or facsimile thereof. Any person, firm or corporation violating the provisions of this section shall be guilty of a felony and upon conviction shall be punished as provided in G.S. 20-177. (1937, c. 407, s. 35; 1959, c. 1264, s. 2; 1971, c. 99; 1975, c. 716, s. 5; 1979, c. 499.)

Editor's Note. —
The 1979 amendment inserted "for any person with fraudulent intent" in the first sentence of subsection (b), deleted the former second sentence of subsection (b), which provided an exception for those employed to print certificates in the normal scope of their employment, and, in the present second sentence of subsection (b), substituted the present language making a violation of this section a felony for former language which declared it to be a misdemeanor punishable by a fine between $100 and $500 and imprisonment for not more than six months or both.

As subsection (a) was not changed by the amendment, it is not set out.

§ 20-71.1. Registration evidence of ownership; ownership evidence of defendant's responsibility for conduct of operation.

Editor's Note. —
For a note discussing the extension of the family purpose doctrine to motorcycles and private property, see 14 Wake Forest L. Rev. 699 (1978).

By enacting this section the legislature changed the prior common law. Broadway v. Webb, 462 F. Supp. 429 (W.D.N.C. 1977).

Legislative Intent. — By enacting this section the legislature showed a clear intent to provide victims of automobile accidents with the opportunity to recover from the owner as well as the driver of a car involved in an accident. Broadway v. Webb, 462 F. Supp. 429 (W.D.N.C. 1977).

Part 4. Transfer of Title or Interest.

§ 20-74. Penalty for failure to make application for transfer within the time specified by law. — It is the intent and purpose of this Article that every new owner or purchaser of a vehicle previously registered shall make application for transfer of title within 20 days after acquiring same, or see that such application is sent in by the lienholder with proper fees, and responsibility for such transfer shall rest on the purchaser. Any person, firm or corporation failing to do so shall pay a penalty of three dollars ($3.00) in addition to the fees otherwise provided in this Article. It is further provided that any dealer or owner who shall knowingly make any false statement in any application required by this Division as to the date a vehicle was sold or acquired shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars ($50.00) or imprisoned not more than 30 days. All moneys colleted under this section shall go to the State Highway Fund. (1937, c. 407, s. 38; 1939, c. 275; 1961, c. 360, s. 10; 1975, c. 716, s. 5; 1979, c. 801, s. 8.)

Editor's Note. —
The 1979 amendment, effective July 1, 1979, substituted "three dollars ($3.00)" for "two dollars ($2.00)" in the second sentence.

§ 20-78. When Division to transfer registration and issue new certificate; recordation.

Cited in Sutton v. Sutton, 35 N.C. App. 670, 242 S.E.2d 644 (1978).

Part 5. Issuance of Special Plates.

§ 20-79. Registration by manufacturers and dealers. — (a) Every manufacturer of or dealer in motor vehicles, trailers or semitrailers shall apply to the Motor Vehicle Division for a license as such upon official forms and shall in his application give the name of the manufacturer or dealer and his bona fide address of each partner; if a corporation, the name of the corporation and the state of incorporation; the bona fide address of the place of business; whether a dealer in new vehicles or in used vehicles and shall state how long in business. Upon receipt of said application the Division shall upon the payment of fees as required by law issue a license to such applicant, together with number plates, which plates shall bear thereon a distinctive number, the name of this State, which may be abbreviated, the year for which issued, together with the word dealer or a distinguishing symbol indicating that such plate or plates are issued to a dealer. The plates so issued may during the year for which issued be transferred from one vehicle to another owned and operated by such manufacturer or dealer.

Dealer and manufacturer plates shall after June 30, 1980, be issued on a fiscal year basis beginning July 1, and plates issued for fiscal year beginning July 1 shall expire on June 30 following the date of issuance.

Any person to whom license and number plates are issued under the provisions of this subsection upon discontinuing business as a dealer or manufacturer shall forthwith surrender to the Division license and all number plates so issued to him.

No person, firm, or corporation shall engage in the business of buying, selling, distributing or exchanging motor vehicles, trailers or semitrailers in this State unless he or it qualifies for and obtains the license required by this section.

Any person, firm, or corporation violating any provision of this subsection shall be guilty of a misdemeanor and for each offense shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000).

(b) Every manufacturer of or dealer in motor vehicles shall obtain and have in his possession a certificate of title issued by the Division to such manufacturer or dealer of each vehicle owned and operated upon the highways by such manufacturer or dealer, except that a certificate of title shall not be required or issued for any new vehicle to be sold as such by a manufacturer or dealer prior to the sale of such vehicle by the manufacturer or dealer; and except that any dealer or any employee of any dealer may operate any motor vehicle, trailer or semitrailer, the property of the dealer, for the purpose of furthering the business interest of the dealer in the sale, demonstration and servicing of motor vehicles, trailers and semitrailers, of collecting accounts, contacting prospective customers and generally carrying out routine business necessary for conducting a general motor vehicle sales business: Provided, that no use shall be made of dealer's demonstration plates on vehicles operated in any other business dealers may be engaged in: Provided further, that dealers may allow the operation of motor vehicles owned by dealers and displaying dealer's demonstration plates in the personal use of persons other than those employed in the dealer's business: Provided further, that said persons shall, at all times while operating a motor vehicle under the provisions of this section, have in their possession a certificate on such form as approved by the Commissioner from the dealer, which shall be valid for not more than 96 hours. This certificate may be renewed for

one additional 96-hour period, pursuant to rules and regulations promulgated by the Commissioner.

(1979, c. 239; c. 612, s. 1.)

Editor's Note. —

The first 1979 amendment, deleted "calendar" preceding "year" in the third sentence of the first paragraph of subsection (a), deleted the former fourth sentence of that paragraph, which read "The license and plates issued under this section shall be in lieu of the registration of such vehicle," and added the second paragraph of subsection (a).

The second 1979 amendment added the last sentence of subsection (b).

As the rest of the section was not changed by the amendments, only subsections (a) and (b) have been set out.

§ 20-79.2. Transporter registration. — (a) A person engaged in a business requiring the limited operation of motor vehicles to facilitate the manufacture, construction or rebuilding of truck cabs or bodies or the foreclosure or repossession of such motor vehicles, or a public utility, as defined in G.S. 62-3(23)a, engaged in the movement of replaced vehicles for sale, may apply to the Commissioner for special registration to be issued to and used by the person or utility upon the following conditions:

(1) Application for Registration. — Only one application shall be required from each person, and such application for registration under this section shall be filed with the Commissioner of Motor Vehicles in such form and detail as the Commissioner shall prescribe, setting forth:
   a. The name and residence address of applicant; if an individual, the name under which he intends to conduct business; if a partnership, the name and residence address of each member thereof, and the name under which the business is to be conducted; if a corporation, the name of the corporation and the name and residence address of each of its officers.
   b. The complete address or addresses of the place or places where the business is to be conducted.
   c. Such further information as the Commissioner may require.

(2) Applications for registration under this section shall be verified by the applicant, and the Commissioner may require the applicant for registration to appear at such time and place as may be designated by the Commissioner for examination to enable him to determine the accuracy of the facts set forth in the written application, either for initial registration or renewal thereof.

(3) Fees. — The annual fee for such registration under this section or renewal thereof shall be nineteen dollars ($19.00), plus an annual fee of six dollars ($6.00) for each set of plates. The application for registration and number plates shall be accompanied by the required annual fee. There shall be no refund of registration fee or fees for number plates in the event of suspension, revocation or voluntary cancellation of registration. There shall be no quarterly reduction in fees under this section.

(4) Issuance of Certificate. — If the Commissioner approves the application, he shall issue a registration certificate in such form as he may prescribe. A registrant shall notify the Commissioner of any change of address of his principal place of business within 30 days after such change is made, and the Commissioner shall be authorized to cancel the registration upon failure to give such notice.

(5) Use. — Transporter number plates issued under this section may be transferred from vehicle to vehicle, but shall be used only for the limited operation of vehicles in connection with the manufacture, construction or rebuilding of truck cabs or bodies or with the

foreclosure or repossession of vehicles owned or controlled by the registrant, or, if the registrant is a public utility, for the limited movement of vehicles in connection with the sale of a replaced vehicle.

(6) Suspension, Revocation or Refusal to Issue or to Renew a Registration. — The Commissioner may deny the application of any person for registration under this section and may suspend or revoke a registration or refuse to issue a renewal thereof if he determines that such applicant or registrant has:

a. Made a material false statement in his application;
b. Used or permitted the use of number plates contrary to law;
c. Been guilty of fraud or fraudulent practices; or
d. Failed to comply with any of the rules and regulations of the Commissioner for the enforcement of this section or with any provisions of this Chapter applicable thereto.

(b) The Commissioner of Motor Vehicles may make all rules and regulations he may deem necessary for the proper administration of this section, particularly with regard to the requirements of evidence of financial responsibility of applicants for transporter plates. (1961, c. 360, s. 21; 1969, c. 600, s. 1; 1975, c. 222; 1979, c. 473, ss. 1, 2; c. 627, ss. 1-3.)

Editor's Note. —

The first 1979 amendment, effective July 1, 1979, inserted "or a public utility, as defined in G.S. 62-3(23)a, engaged in movement of replaced vehicles for sale," in the introductory paragraph of subsection (a), and substituted "the" for "such" preceding "person" and inserted "or utility" near the end of that paragraph. In subdivision (a)(5) the amendment added "or, if the registrant is a public utility, for the limited movement of vehicles in connection with the sale of a replaced vehicle" at the end of the subdivision.

The second 1979 amendment substituted "manufacturer, construction or rebuilding of truck cabs" for "manufacturer or construction of cabs" near the beginning of the introductory paragraph in subsection (a) and near the middle of subdivision (5) of subsection (a).

§ 20-81. Official license plates. — Official license plates issued to officials shall be subject to the same fees and transfer provisions as provided in G.S. 20-87 and 20-64 respectively and shall be issued as follows:

(1) Senate and Congressional. — Official license plates issued to the United States Senators shall bear the words "U.S. Senate," be numbered 1 and 2, and shall be issued on the basis of seniority. The official plates issued to United States Congressmen shall bear the words "U.S. House" and be numbered 1 through 11 and shall be issued on the basis of congressional districts.

(2) North Carolina General Assembly. — Official plates issued to members of the North Carolina State Senate or House of Representatives shall bear the words "Senate" or "State House" followed by the Senator's or Representative's assigned seat number.

(3) Judicial. — Official plates issued to the judiciary shall be issued as follows:

a. Appellate division. — Official plates that shall be issued upon request to the Chief Justice and Associate Justices of the Supreme Court of North Carolina and the Chief Judge and Associate Judges of North Carolina Court of Appeals shall bear the letter "J" followed by numerical designation from 1 through 19. The Chief Justice upon request shall be issued the plate bearing number 1 and the remaining plates shall first be issued upon request to the Associate Justices on the basis of seniority. The Chief Judge shall be issued upon request the next such judicial plate and the remaining plates shall be issued upon request to the Associate Judges on the basis of seniority. Retired members of the Supreme

Court and the Court of Appeals shall receive an official plate upon request similar in every respect to the plate issued to the regular justices and judges bearing the numerical designation of his or her position of seniority at the time of retirement except that the numerical designation shall be followed with the letter "X." Official plate J-20 may be issued upon request to the Director of the Administrative Office of the Courts.

b. Superior court. — Official plates shall be issued to the various senior resident judges of the superior court upon request and shall bear the letter "J" followed by a numerical designation equal to the sum of the numerical designation of their respective judicial districts plus 20. Where there is more than one resident judge of the superior court within a district, official plates shall upon request be issued to other resident judges serving within the district similar to the official plate to be issued upon request to the senior resident judge of the district except the numerical designation on each subsequent plate shall be followed by a letter of the alphabet beginning with the letter "A," which shall be indicative of the recipient's position as to seniority. Special judges and emergency judges of the superior court shall be issued an official plate bearing the letter "J" with a numerical designation as designated by the Administrative Office of the Courts with the approval of the Chief Justice of the Supreme Court of North Carolina. Retired judges shall be issued a similar plate except that the numerical designation shall be followed by the letter "X."

c. North Carolina district court judges. — An official plate shall be issued upon request to each chief judge of the district courts of North Carolina which shall bear the letter "J" followed by a numerical designation equal to the sum of the numerical designation of their respective judicial districts plus 100 and all other judges of the district courts serving within the same judicial district shall, upon request, be issued an official plate bearing the same letter and numerical designation as appears on the official plate issued to the chief district judge of the judicial district except that on each subsequent official plate issued within a district, the numerical designation shall be followed by a letter of the alphabet beginning with the letter "A" which shall be indicative of the recipient's position as to seniority. Retired judges shall be issued a similar plate except that the numerical designation shall be followed by the letter "X."

d. District attorneys. — Official plates shall be issued upon request to the various district attorneys which plates shall bear the letters "DA" followed by a numerical designation indicative of their judicial district.

e. United States judges. — Official plates shall be issued upon request to Justices of the United States Supreme Court, Judges of the United States Circuit Court of Appeals and to the District Judges of the United States District Courts residing in North Carolina and shall bear the words "U.S. Judge" followed by a numerical designation beginning with the number "1" which shall be indicative of the judge's seniority position as to the date he began continuous service as a United States Judge as designated by the Secretary of State. Retired judges and judges who have taken senior status shall be issued similar plates except that the numerical designation shall be based upon the date of such retirement or assumption of senior status and shall follow the numerical designation of active justices and judges.

f. United States attorneys. — Official plates shall be issued upon request to the United States Attorneys, which plates shall bear the letters, "U.S. Attorney," followed by a numerical designation indicative of their district, with 1 being the Eastern District, 2 being the Middle District, and 3 being the Western District.

g. United States marshals. — Official plates shall be issued upon request to the United States Marshals, which plates shall bear the letters, "U.S. Marshal" followed by a numerical designation indicative of their district, with 1 being the Eastern District, 2 being the Middle District, and 3 being the Western District.

(4) Elective and Appointive. — Official plates issued to elective and appointive members of State government shall bear number designations beginning with number 1 which shall be assigned to the Governor of North Carolina and numbers following thereafter shall be issued to in the following order:

2. Lieutenant Governor of North Carolina.
3. Speaker of the House of Representatives.
4. President Pro Tempore of the Senate.
5. Secretary of State.
6. State Auditor.
7. State Treasurer.
8. Superintendent of Public Instruction.
9. Attorney General.
10. Commissioner of Agriculture.
11. Commissioner of Labor.
12. Commissioner of Insurance.
13. Speaker Pro Tempore of the House.
14. Legislative Services Officer.
15. Secretary of Administration.
16. Secretary of Natural Resources and Community Development.
17. Secretary of Revenue.
18. Secretary of Human Resources.
19. Secretary of Commerce.
20. Secretary of the Department of Correction.
21. Secretary of Cultural Resources.
22. Secretary of Crime Control and Public Safety.
23-29. To be reserved for and assigned to members of the Governor's staff at the direction of the Governor.
30. State Budget Officer.
31. State Personnel Director.
32-41. To be reserved for and assigned to nonlegislative members of the Advisory Budget Commission at the direction of the Governor.
42. Chairman, State Board of Education.
43. President, U. N. C. System.
44. Chairman, A.B.C. Board.
45. Member, A.B.C. Board.
46. Member, A.B.C. Board.
47. Assistant Commissioner of Agriculture.
48. Assistant Commissioner of Agriculture.
49. Deputy Secretary of State.
50. Deputy State Treasurer.
51. Assistant State Treasurer.
52. Deputy Commissioner, Department of Labor.
53. Chief Deputy, Department of Insurance.
54. Assistant Commissioner of Insurance.
55-65. Shall be reserved for and assigned to the Attorney General's deputies and assistants only. Specific number assignments shall be at the direction of the Attorney General.

66-88. Shall be reserved for and assigned upon request to nonlegislative members of the Board of Economic Development. Specific number assignments to such members shall be at the direction of the Governor.

89-96. Shall be reserved for and assigned upon request to nonlegislative members of the State Ports Authority. Specific number assignments to such members shall be at the direction of the Governor.

97-104. Shall be reserved for and assigned upon request to members of the Utilities Commission. Number 97 to be upon request assigned to the Chairman of the Utilities Commission with remaining numbers to be assigned upon request to the remaining members of the Utilities Commission on the basis of seniority.

105-109. Shall be reserved for and assigned upon request to members of the Parole Commission. Number 105 to be upon request assigned to the Chairman of the Parole Commission with remaining numbers to be assigned upon request to the remaining members of the Parole Commission on the basis of seniority.

110-200. Shall be reserved for and assigned upon request to members of State boards and commissions and State employees at the direction of the Governor.

(5) Department of Transportation. — Official plates shall be issued upon request to various members of the Divisions of the Department of Transportation which shall bear the letters "DOT" followed by a number designated from 1 through 85. Specific number assignments to members of the Divisions of the Department of Transportation shall be at the direction of the Governor.

License plates issued by the Division of Motor Vehicles of the Department of Transportation pursuant to this section shall be assessed a fee of ten dollars ($10.00), in addition to any fees charged under G.S. 20-87 and 20-88. These plates will be subject to the same transfer provisions as provided in G.S. 20-64.

The revenue derived from the additional fee for such plates shall be placed in a separate fund designated the "Officials Registration Plate Fund." After deducting the cost of the plates, plus budgetary requirements for handling an issuance, to be determined by the Commissioner of Motor Vehicles, any remaining moneys derived from the additional fee for such plate shall be periodically transferred in accordance with G.S. 20-81.3(c). (1937, c. 407, s. 45; 1961, c. 360, s. 17; 1975, cc. 432, 865; 1977, c. 762, s. 1; 1979, c. 443, ss. 1, 2.)

Editor's Note. —

The 1979 amendment deleted "State" preceding "officials" in the introductory paragraph, added paragraph g of subdivision (3) and deleted "to State officials" after "issued" in the first sentence of the next-to-last unnumbered paragraph.

§ 20-81.1. Special plates for amateur radio operators. — (a) Every owner of a motor vehicle who holds an unrevoked and unexpired amateur radio license of a renewable nature, issued by the Federal Communications Commission, shall, upon payment of registration and licensing fees for such vehicle as required by law and an additional fee as required by G.S. 20-81.3(b) for special personalized licensed plates, be issued plates of similar size and design as the regular registration plates provided for by G.S. 20-63 or other provisions of law, upon which shall be inscribed, in lieu of the usual registration number, the official amateur radio call letters of such persons as assigned by the Federal Communications Commission.

(b) Application for special registration plates shall be made on forms which shall be provided by the Division of Motor Vehicles and shall contain proof

satisfactory to the Division that the applicant holds an unrevoked and unexpired official amateur radio license and shall state the call letters which have been assigned to the applicant. Applications must be filed prior to 90 days before the day when regular registration plates for the year are made available to motor vehicle owners.

(c) Special registration plates issued pursuant to this section shall be replaced annually to the same extent as regular registration plates are replaced. These plates shall be valid during the year for which issued. If the amateur radio license of a person holding a special plate issued pursuant to this section shall be canceled or rescinded by the Federal Communications Commission, such person shall immediately return the special plates to the Division of Motor Vehicles.

(d) The provisions of this section shall apply to calendar years beginning after December 31, 1974. The Division of Motor Vehicles is authorized to, and shall, make such provisions prior to January 1, 1975, as are necessary for the issuance for the year 1975 of the special plates provided for in this section.

(e) The revenue derived from the additional fee for the amateur radio plates shall be placed in a separate fund designated the "Amateur Radio Registration Plate Fund." After deducting the cost of the plates, plus budgetary requirements for handling and issuance to be determined by the Commissioner of Motor Vehicles, any remaining moneys derived from the additional fee for such plates shall be periodically transferred to the Department of Transportation as provided in G.S. 20-81.3(c)(2). (1951, c. 1099; 1955, c. 291; 1961, c. 360, s. 18; 1971, c. 589, ss. 1, 2; c. 829, ss. 1, 2, 4; 1973, c. 507, s. 5; c. 1395, s. 1; 1975, c. 716, s. 5; 1977, c. 464, s. 34; 1979, c. 137, ss. 1, 2.)

Editor's Note. —

The 1979 amendment, effective July 1, 1979, deleted "which is primarily used for pleasure or communication purposes" after "motor vehicle" near the beginning of subsection (a), substituted "as required by G.S. 20-81.3(b) for special personalized licensed plates" for "of four dollars ($4.00)" near the middle of subsection (a), and substituted "90" for "60" in the second sentence of subsection (b).

§ 20-81.3. Special personalized registration plates. — (a) The Commissioner may issue under such regulation as he shall deem appropriate a special personalized registration plate to the owner of a private passenger motor vehicle or private trucks in lieu of another number plate. Such personalized registration plate shall be of such design and shall bear such letter or letters and numerals as the Commissioner shall prescribe, but there shall be no duplication of a registration plate. The Commissioner shall in his discretion refuse the issue of such letter combinations which might carry connotations offensive to good taste and decency.

(f) In the event a personalized registration plate is lost, stolen or mutilated, the owner may not obtain another such plate bearing the same letter, letters or numerals until the next registration year. He may, upon proper application and payment of a fee of five dollars ($5.00), obtain a plate of the regular series. Provided, further, that a special personalized registration plate revoked for violation of the motor vehicle laws shall not be reissued, but in lieu thereof a plate of the regular series will be issued upon payment of the appropriate fee for the new registration plate. (1967, c. 413; 1971, c. 42; 1973, c. 507, s. 5; c. 1262, s. 86; 1975, c. 716, s. 5; 1977, c. 464, s. 3; c. 771, s. 4; 1979, c. 126, ss. 1, 2.)

Editor's Note. —

The 1979 amendment, effective July 1, 1979, deleted "not to exceed one ton manufacturer's rated capacity" following "trucks" near the end of the first sentence in subsection (a), and substituted "five dollars ($5.00)" for "one dollar ($1.00)" in the second sentence of subsection (f).

As the other subsections were not changed by the amendment, only subsections (a) and (f) are set out.

§ 20-81.5. Civil Air Patrol plates. — (a) The Commissioner shall cause to be made each year sufficient number of license plates to furnish each member of the North Carolina Wing of the Civil Air Patrol with not more than two thereof, said license plates to be in the same form and character as other license plates now or hereinafter authorized by law to be used upon private vehicles registered in this State, except that such license plates shall bear on the face thereof the following: the words "North Carolina," the year designation, and the words "Civil Air Patrol." The said license plates shall be issued only to members of the North Carolina Wing of the Civil Air Patrol and for each license plate the Commissioner shall collect a fee as required by G.S. 20-81.3(b) for special personalized registration plates, in addition to the fees in an amount equal to the fees collected for the licensing and registering of private vehicles. The Commander of the North Carolina Wing of the Civil Air Patrol shall furnish the Commissioner annually with a list of the number of such distinctive plates required accompanied by the fee referred to hereinabove and such list shall contain the rank of each officer listed in order of his seniority in the North Carolina Civil Air Patrol. The said license plates to be set aside for officer personnel shall be numbered beginning with the number 201 and running in numerical sequence thereafter up to and including the number 500, according to seniority; the senior officer being issued the plate bearing the number 201. Enlisted personnel, senior members and cadet members applying for such distinctive plates shall, upon application and payment of the required fee, receive such plates in numerical sequence beginning with the number 501. Applications for such distinctive license plates shall be on forms as may be agreed upon by the Wing Commander of the North Carolina Civil Air Patrol and the Division of Motor Vehicles. If a holder of such a distinctive license plate shall be discharged from the North Carolina Civil Air Patrol under other than honorable conditions, he shall within 30 days exchange such distinctive plate for a standard plate.

(1979, c. 193; c. 746.)

Editor's Note. —

The first 1979 amendment, effective July 1, 1979, deleted "automobile" after "number of" and "passenger" after "private" in the first sentence of subsection (a) and substituted "as required by G.S. 20-81.3(b) for special personalized registration plates" for "of five dollars ($5.00)" in the second sentence of that subsection.

The second 1979 amendment, effective July 1, 1979, deleted "five dollar ($5.00)" preceding "fee" in the third sentence of subsection (a).

§ 20-81.6. Special plates for Class D citizens radio station operators. — (a) Every owner of a motor vehicle who holds an unrevoked and unexpired Class D citizens radio station license of a renewable nature, issued by the Federal Communications Commission, shall, upon payment of registration and licensing fees for such vehicle as required by law and an additional fee of ten dollars ($10.00), be issued plates of similar size and design as the regular registration plates provided for by G.S. 20-63 or other provisions of law, upon which shall be inscribed, in lieu of the usual registration number, the official Class D citizens radio station call letters of such persons as assigned by the Federal Communications Commission.

(b) Application for special registration plates shall be made on forms which shall be provided by the Division of Motor Vehicles and shall contain proof satisfactory to the Division that the applicant holds an unrevoked and unexpired official Class D citizens radio station license and shall state the call letters which have been assigned to the applicant. Applications must be filed prior to 90 days before the day when regular registration plates for the year are made available to motor vehicle owners.

(1979, c. 176, ss. 1-3.)

Editor's Note. —

The 1979 amendment, effective July 1, 1979, deleted "which is primarily used for pleasure or communication purposes" after "motor vehicle" near the beginning of subsection (a), deleted a former proviso at the end of that subsection providing for a ten dollar fee for a Class D citizens radio station license, and substituted "90 days" for "60 days" in the last sentence of subsection (b).

As the rest of the section was not changed by the amendment, only subsections (a) and (b) are set out.

Part 6. Vehicles of Nonresidents of State, etc.

§ 20-84. Vehicles owned by State, municipalities or orphanages, etc.; certain vehicles operated by local chapters of American National Red Cross. — The Division upon proper proof being filed with it that any motor vehicle for which registration is herein required is owned by the State or any department thereof, or by any county, township, city or town, or by any board of education, or by any orphanage or civil air patrol, or incorporated emergency rescue squad, shall collect three dollars and fifty cents ($3.50) for the registration of such motor vehicles, but shall not collect any fee for application for certificate of title in the name of the State or any department thereof, or by any county, township, city or town, or by any board of education or orphanage: Provided, that the term "owned" shall be construed to mean that such motor vehicle is the actual property of the State or some department thereof or of the county, township, city or town, or of the board of education, and no motor vehicle which is the property of any officer or employee of any department named herein shall be construed as being "owned" by such department. Provided, that the above exemptions from registration fees shall also apply to any church-owned bus used exclusively for transporting children and parents to Sunday school and church services and for no other purpose.

In lieu of the annual three dollars and fifty cents ($3.50) registration provided for in this section, the Division may for the license year 1950 and thereafter provide for a permanent registration of the vehicles described in this section and issue permanent registration plates for such vehicles. The permanent registration plates issued pursuant to this paragraph shall be of a distinctive color and shall bear thereon the word "permanent." Such plates may be transferred as provided in G.S. 20-78 to a replacement vehicle of the same classification. For the permanent registration and issuance of permanent registration plates provided for in this paragraph, the Division shall collect a fee of three dollars and fifty cents ($3.50) for each vehicle so registered and licensed.

The provisions of this section are hereby made applicable to vehicles owned by a rural fire department, agency or association.

The Division of Motor Vehicles shall issue to the North Carolina Tuberculosis Association, Incorporated, or any local chapter or association of said corporation, for a fee of three dollars and fifty cents ($3.50) for each plate a permanent registration plate which need not be thereafter renewed for each motor vehicle in the form of a mobile X-ray unit which is owned by said North Carolina Tuberculosis Association, Incorporated, or any local chapter or local association thereof and operated exclusively in this State for the purpose of diagnosis, treatment and discovery of tuberculosis. The initial three dollars and fifty cents ($3.50) fee required by this section and for this purpose shall be in full payment of the permanent registration plates issued for such vehicle operated as a mobile X-ray unit, and such plates need not thereafter be renewed, and such plates may be transferred as provided in G.S. 20-78 to replacement vehicles to be used for the purposes above described and for which the plates were originally issued.

The Division of Motor Vehicles shall issue to the American National Red Cross, upon application of any local chapter thereof and payment of a fee of

three dollars and fifty cents ($3.50) for each plate, a permanent registration plate, which need not be thereafter renewed, for all disaster vans, bloodmobiles, handivans, and such sedans and station wagons as are used for emergency or disaster work, and operated by a local chapter in this State in the business of the American National Red Cross. Such plates may be transferred as provided in G.S. 20-78 to a replacement vehicle to be used for the purposes above described and for which the plates were originally issued. In the event of transfer of ownership to any other person, firm or corporation, or transfer or reassignment of any vehicle bearing such registration plate to any chapter or association of the American National Red Cross in any other state, territory or country, the registration plate assigned to such vehicle shall be surrendered to the Division of Motor Vehicles.

In lieu of all other registration requirements, the Commissioner shall each year assign to the State Highway Patrol, upon payment of three dollars and fifty cents ($3.50) per registration plate, a sufficient number of regular registration plates of the same letter prefix and in numerical sequence beginning with number 100 to meet the requirements of the State Highway Patrol for use on Division vehicles assigned to the State Highway Patrol. The commander of the Patrol shall, when such plates are assigned, issue to each member of the State Highway Patrol a registration plate for use upon the Division vehicle assigned to him pursuant to G.S. 20-190 and assign a registration plate to each Division service vehicle operated by the Patrol. An index of such assignments of registration plates shall be kept at each State Highway Patrol radio station and a copy thereof shall be furnished to the registration division of the Division. Information as to the individual assignments of such registration plates shall be made available to the public upon request to the same extent and in the same manner as regular registration information. The commander, when necessary, may reassign registration plates provided that such reassignment shall be made to appear upon the index required herein within 20 days after such reassignment.

The Division of Motor Vehicles shall upon appropriate certification of financial responsibility issue to sheltered workshops recognized or approved by the Division of Vocational Rehabilitation Services of the Department of Human Resources upon application and payment of a fee of three dollars and fifty cents ($3.50) for each plate, a permanent registration plate for vehicles registered to and operated by such sheltered workshops. The initial three dollars and fifty cents ($3.50) fee required by this section and for this purpose shall be in full payment of the permanent registration plate issued for such vehicle operated by a sheltered workshop and such plates need not thereafter be renewed, and such plates may be transferred as provided in G.S. 20-78 to a replacement vehicle to be used by the sheltered workshop designated on the registration card.

On and after January 1, 1972, permanent registration plates used on all vehicles owned by the State of North Carolina or a department thereof shall be of a distinctive color and design which shall be readily distinguishable from all other permanent registration plates issued pursuant to this section or G.S. 20-84.1. For the purpose of carrying out the intent of this paragraph, all vehicles owned by the State of North Carolina or a department thereof in operation as of October 1, 1971, and bearing a permanent registration shall be reregistered during the months of October, November and December, 1971, and upon reregistration, registration plates issued for such vehicles shall be of a distinctive color and design as provided for hereinabove. (1937, c. 407, s. 48; 1939, c. 275; 1949, c. 583, s. 1; 1951, c. 388; 1953, c. 1264; 1955, cc. 368, 382; 1967, c. 284; 1969, c. 800; 1971, c. 460, s. 1; 1975, c. 548; c. 716, s. 5; 1977, c. 370, s. 1; 1979, c. 801, s. 9.)

Editor's Note. — The 1979 amendment, effective July 1, 1979, substituted "three dollars and fifty cents ($3.50)" for "one dollar ($1.00)" throughout the section.

§ 20-84.1. Permanent plates for city buses. — The Division may for the license year 1950 and thereafter provide for a permanent registration and issue permanent registration plates for city buses and trackless trolleys when such buses and trolleys are operated under franchises authorizing the use of city streets, but no bus or trackless trolley shall be registered or licensed under this section if it is operated under a franchise authorizing an intercity operation. The permanent registration plates issued pursuant to the provisions of this section shall be of a distinctive color and shall bear thereon the word "permanent." Such plates may be transferred as provided in G.S. 20-78 to a replacement vehicle of the same classification. For the permanent registration and issuance of permanent registration plates as provided for in this section, the Division shall collect a fee of three dollars and fifty cents ($3.50) for each vehicle so registered and licensed. (1949, c. 583, s. 6; 1975, c. 716, s. 5; 1977, c. 370, s. 2; 1979, c. 801, s. 10.)

Editor's Note. — The 1979 amendment, effective July 1, 1979, substituted "three dollars and fifty cents ($3.50)" for "one dollar ($1.00)" in the last sentence.

Part 7. Title and Registration Fees.

§ 20-85. Schedule of fees. — Except as provided in G.S. 20-68, there shall be paid to the Division for the issuance of certificates of title, transfer of registration and replacement of registration plates fees according to the following schedules:

(1) Each application for certificate of title $3.50
(2) Each application for duplicate or corrected certificate of title . . 5.00
(3) Each application of repossessor for certificate of title 3.50
(4) Each transfer of registration 2.00
(5) Each set of replacement registration plates 5.00
(6) Each application for duplicate registration certificate 2.00
(7) Each application for recording supplementary lien 2.00
(8) Each application for removing a lien from a certificate of title . 2.00

(1937, c. 407, s. 49; 1943, c. 648; 1947, c. 219, s. 9; 1955, c. 554, s. 4; 1961, c. 360, s. 19; c. 835, s. 11; 1975, c. 430; c. 716, s. 5; c. 727; c. 875, s. 4; c. 879, s. 46; 1979, c. 801, s. 11.)

Editor's Note. — The 1979 amendment, effective July 1, 1979, added "Except as provided in G.S. 20-68" at the beginning of the introductory paragraph, increased the fees in subdivisions (1) and (3) from $2.00 to $3.50, in subdivision (2) from $2.00 to $5.00, and in subdivision (6) from .50 to $2.00.

§ 20-88. Property-hauling vehicles.

(h) Repealed by Session Laws 1979, c. 419. (1937, c. 407, s. 52; 1939, c. 275; 1941, cc. 36, 227; 1943, c. 648; 1945, c. 569, s. 1; c. 575, s. 1; c. 576, s. 3; c. 956, ss. 1, 2; 1949, cc. 355, 361; 1951, c. 583; c. 819, ss. 1, 2; 1953, c. 568; c. 694, s. 1; c. 1122; 1955, c. 554, s. 8; 1957, c. 681, s. 2; c. 1215; 1959, c. 571; 1961, c. 685; 1963, c. 501; c. 702, ss. 2, 3; 1967, c. 1095, ss. 1, 2; 1969, c. 600, ss. 12-17; c. 1056, s. 1; 1973, c. 154, ss. 1, 2; c. 291; 1975, c. 716, s. 5; 1977, c. 638; 1979, c. 419.)

Editor's Note. —
The 1979 amendment repealed subsection (h), which required quarterly reports to be filed with the Commissioner by operators of diesel-fuel operated vehicles, and that the tax be paid upon such fuel, and which declared it a felony to fail to make such reports or to make a false report.

As the other subsections were not changed by the amendment they are not set out.

Amendment Effective April 1, 1980. — Session Laws 1979, c. 631, effective April 1, 1980, will add to subsection (b) a new subdivision (5a), reading as follows:

"(5a) Notwithstanding any other provision of this Chapter, license plates issued pursuant to this subsection at the former rate may be purchased for any three-month period at one-fourth of the annual fee."

§ 20-91.1. Taxes to be paid; suits for recovery of taxes.

Editor's Note. — For survey of 1976 case law on taxation, see 55 N.C.L. Rev. 1083 (1977).

Cited in C & H Transp. Co. v. North Carolina Div. of Motor Vehicles, 34 N.C. App. 616, 239 S.E.2d 309 (1977).

§ 20-94. Partial payments. — In the purchase of licenses, where the gross amount of the license to any one owner amounts to more than four hundred dollars ($400.00), half of such payment may, if the Commissioner is satisfied of the financial responsibility of such owner, be deferred until June 1 in any calendar year upon the execution to the Commissioner of a draft upon any bank or trust company upon forms to be provided by the Commissioner in an amount equivalent to one half of such tax, plus a carrying charge of one percent (1%): Provided, that any person using any tag so purchased after the first day of June in any such year without having first provided for the payment of such draft, shall be guilty of a misdemeanor. No further license plates shall be issued to any person executing such a draft after the due date of any such draft so long as such draft or any portion thereof remains unpaid. Any such draft being dishonored and not paid shall be subject to the penalties prescribed in G.S. 20-178 and shall be immediately turned over by the Commissioner to his duly authorized agents and/or the State Highway Patrol, to the end that this provision may be enforced. When the owner of the vehicles for which a draft has been given sells or transfers ownership to all vehicles covered by the draft, such draft shall become payable immediately, and such vehicles shall not be transferred by the Division until the draft has been paid. Any one owner whose gross license amounts to more than two hundred dollars ($200.00) but not more than four hundred dollars ($400.00) may also be permitted to sign a draft in accordance with the foregoing provisions of this section provided such owner makes application for the draft on or before February 1 during the license renewal period. (1937, c. 407, s. 58; 1943, c. 726; 1945, c. 49, ss. 1, 2; 1947, c. 219, s. 10; 1953, c. 192; 1967, c. 712; 1975, c. 716, s. 5; 1979, c. 801, s. 12.)

Editor's Note. —
The 1979 amendment, effective July 1, 1979, substituted "one percent (1%)" for "one-half of one percent (½ of 1%)" preceding the proviso in the first sentence.

§ 20-95. Licenses for less than a year.

Amendment Effective July 1, 1980. — Session Laws 1979, c. 476, effective July 1, 1980, will amend this section to read:

"**§ 20-95. License for less than a year.** — (a) Except as provided in subsection (b) of this section, licenses issued on or after April 1 and before July 1 of each year shall be three-fourths of the annual fee; licenses issued on or after July 1 and before October 1 shall be one-half of the annual fee; and licenses issued on or after

October 1 shall be one-fourth of the annual fee.

(b) This section shall not apply to licenses issued pursuant to G.S. 20-65, 20-79.1, 20-79.2, 20-79.3, 20-81.2, 20-84, 20-84.1, 20-87(9) through (10) and 20-88(c)."

§ 20-97. Taxes compensatory; no additional tax. — (a) All taxes levied under the provisions of this Article are intended as compensatory taxes for the use and privileges of the public highways of this State, and shall be paid by the Commissioner to the State Treasurer, to be credited by him to the State Highway Fund; and no county or municipality shall levy any license or privilege tax upon the use of any motor vehicle licensed by the State of North Carolina, except that cities and towns, other than the City of Charlotte, the City of Hendersonville, the Town of Cape Carteret, the Town of Mount Olive, the Town of Stoneville and all incorporated cities and towns in the counties of Buncombe, Cumberland, Davidson, Granville, Johnston, Lenoir, Madison, McDowell, New Hanover, Pender, and Yancey, may levy not more than one dollar ($1.00) per year upon any such vehicle resident therein, the City of Concord in Cabarrus County may levy not more than three dollars ($3.00) per year upon any such vehicle resident therein, the City of Roanoke Rapids, the Town of Weldon, the Town of Garner, and the Town of Elizabethtown may levy not more than three dollars ($3.00) per year upon any such vehicle resident therein, and the City of Charlotte, the City of Hendersonville, the Town of Cape Carteret, the Town of Mount Olive, the Town of Stoneville and all incorporated cities and towns in the counties of Buncombe, Cumberland, Davidson, Granville, Johnston, Lenoir, Madison, McDowell, New Hanover, Pender, and Yancey, may levy not more than five dollars ($5.00) per year upon any such vehicle resident therein: Provided, however, that cities and towns may levy, in addition to the amounts hereinabove provided for, a sum not to exceed fifteen dollars ($15.00) per year upon each vehicle operated in such city or town as a taxicab.

(b) No additional franchise tax, license tax, or other fee shall be imposed by the State against any franchise motor vehicle carrier taxed under this Article nor shall any county, city or town impose a franchise tax or other fee upon them, except that cities and towns may levy a license tax not in excess of fifteen dollars ($15.00) per year on each vehicle operated in such city as a taxicab as provided in subsection (a) hereof.

(1979, c. 173, s. 1; c. 216, s. 1; c. 217; c. 248, s. 1; c. 398; c. 400, s. 1; c. 458; c. 530, s. 1; c. 790.)

Local Modification. — Caswell: 1979, c. 450.

Editor's Note. —

Session Laws 1977, c. 433, s. 2, as amended by Session Laws 1977, c. 880, s. 2, and Session Laws 1979, c. 173, s. 2, c. 216, s. 2, c. 248, s. 2, c. 400, s. 2, and c. 530, s. 2, provides: "This act applies only to the City of Charlotte, the City of Hendersonville, the Town of Cape Carteret, the Town of Mount Olive, the Town of Stoneville and to the incorporated cities and towns in the counties of Buncombe, Cumberland, Davidson, Johnston, Lenoir, Madison, McDowell, New Hanover, Pender, and Yancey."

Session Laws 1979, c. 173, s. 1, inserted "the Town of Stoneville" in two places in subsection (a).

Session Laws 1979, c. 216, s. 1, inserted "the City of Hendersonville" in two places in subsection (a).

Session Laws 1979, c. 217, effective January 1, 1980, inserted the provision as to the City of Concord in Cabarrus County in subsection (a).

Session Laws 1979, c. 248, s. 1, inserted "Lenoir" in the list of counties in subsection (a).

Session Laws 1979, c. 398, inserted "Granville" in the list of counties in subsection (a).

Session Laws 1979, c. 400, s. 1, inserted "the Town of Cape Carteret" in two places in subsection (a).

Session Laws 1979, c. 458, effective January 1, 1980, inserted the provisions as to the City of Roanoke Rapids and the Town of Elizabethtown in subsection (a).

Session Laws 1979, c. 530, s. 1, inserted "the Town of Mount Olive" in two places in subsection (a).

Session Laws 1979, c. 790, effective January 1, 1980, inserted the provisions as to the Town of Weldon and the Town of Garner in subsection (a).

Subsection (b) of this section was inadvertently omitted from the Replacement Volume.

As subsection (c) was not changed by the amendments, it is not set out.

Applied in Cooke v. Futrell, 37 N.C. App. 441, 246 S.E.2d 65 (1978).

Part 8. Anti-Theft and Enforcement Provisions.

§ 20-106. Receiving or transferring stolen vehicles.

Cross Reference. —

For statute providing the maximum punishment for felonies, effective July 1, 1980, see § 14-1.1.

As to seizure and forfeiture of conveyances used in committing a crime under this section, see § 14-86.1.

Amendment Effective July 1, 1980. — Session Laws 1979, c. 760, s. 5, effective July 1, 1980, will amend this section to read as follows:

"**§ 20-106. Receiving or transferring stolen vehicles.** — Any person who, with intent to procure or pass title to a vehicle which he knows or has reason to believe has been stolen or unlawfully taken, receives or transfers possession of the same from or to another, or who has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken, and who is not an officer of the law engaged at the time in the performance of his duty as such officer, shall be punished as a Class I felon."

Session Laws 1979, c. 760, s. 6, provides: "This act shall become effective on July 1, 1980, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

The purpose of this section, etc. —

In accord with 1st paragraph in original. See State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978).

Exception for Police. — The provision exculpating police officers in the line of duty was apparently placed in the statute out of an abundance of legislative caution. Such a provision may have been thought necessary in light of the fact that the crime charged merely requires possession with knowledge that the vehicle is stolen, not criminal intent. The provision is an exception to the statute, not an element of the offense. State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978).

Whether the defendant was a policeman in the line of duty is not an essential element of the substantive crime under this section. State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978).

Section 14-71 Not Lesser Included Offense. — The two offenses under this section and § 14-71 are separate offenses. The latter is not a lesser included offense under the former. State v. Carlin, 37 N.C. App. 228, 245 S.E.2d 586 (1978).

No Felonious Intent Required. —

This section requires only that the State prove defendant "knew or [had] reason to believe" that the vehicle in his possession was stolen. No felonious intent is required. State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978).

Sufficiency of Evidence. — Evidence that the defendant was in possession of the stolen vehicle approximately one month after it was stolen was not sufficient to raise an inference that the defendant knew or had reason to believe that the automobile was stolen where the evidence offered by the State demonstrated the intervening agency of others. State v. Leonard, 34 N.C. App. 131, 237 S.E.2d 347 (1977).

Evidence tending to show that the public vehicle identification number plate on an automobile had been replaced was not sufficient to raise an inference that defendant knew or had reason to believe that the vehicle was stolen, where there was no evidence that the alteration was made by defendant or with his knowledge. State v. Leonard, 34 N.C. App. 131, 237 S.E.2d 347 (1977).

Doctrine of Possession of Recently Stolen Goods Justifies Denial of Nonsuit. — The doctrine of the possession of recently stolen goods is, under appropriate circumstances, applicable to justify a denial of a motion for nonsuit in a case charging illegal possession of a stolen vehicle pursuant to this section. State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978).

§ 20-109. Altering or changing engine or other numbers.

Cross Reference. —
For statute providing the maximum punishment for felonies, effective July 1, 1980, see § 14-1.1.

Amendment Effective July 1, 1980. — Session Laws 1979, c. 760, s. 5, effective July 1, 1980, will amend the last sentence of subsection (b) to read as follows: "A violation of this subsection shall be punishable as a Class I felony."

Session Laws 1979, c. 760, s. 6, provides: "This act shall become effective on July 1, 1980, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

The requirement that a serial or motor number alleged to have been altered be one assigned to a vehicle by the Division of Motor Vehicles of the Department of Transportation is an essential element of the offense condemned by subdivision (b)(1) of this section. Before the State is entitled to a conviction, it must prove the presence of this element beyond a reasonable doubt from the evidence. State v. Wyrick, 35 N.C. App. 352, 241 S.E.2d 355 (1978).

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

§ 20-116. Size of vehicles and loads.

(d) A vehicle having two axles shall not exceed 35 feet in length of extreme overall dimensions inclusive of front and rear bumpers. Provided, however, a bus with two axles may be up to 40 feet in length overall of dimensions inclusive of front and rear bumpers. A vehicle having three axles shall not exceed 40 feet in length overall of dimensions inclusive of front and rear bumpers. A truck-tractor and semitrailer shall be regarded as two vehicles for the purpose of determining lawful length and license taxes.

(e) No combination of vehicles coupled together shall consist of more than two units and no such combination of vehicles shall exceed a total length of 55 feet inclusive of front and rear bumpers, subject to the following exceptions: Said length limitation shall not apply to vehicles operated in the daytime when transporting poles, pipe, machinery or other objects of a structural nature which cannot readily be dismembered, nor to such vehicles transporting such objects operated at nighttime by a public utility when required for emergency repair of public service facilities or properties, but in respect to such night transportation every such vehicle and the load thereon shall be equipped with a sufficient number of clearance lamps on both sides and marker lamps upon the extreme ends of said projecting load to clearly mark the dimensions of such load: Provided that vehicles designed and used exclusively for the transportation of motor vehicles shall be permitted an overhang tolerance front or rear not to exceed five feet. Provided, that wreckers in an emergency may tow a combination tractor and trailer to the nearest feasible point for repair and/or storage: Provided, that the Department of Transportation shall have authority to designate any highways upon the State system as light-traffic roads when, in the opinion of the Department of Transportation, such roads are inadequate to carry and will be injuriously affected by the maximum load, size, and/or width of trucks or buses using such roads as herein provided for, and all such roads so designated shall be conspicuously posted as light-traffic roads and the maximum load, size and/or width authorized shall be displayed on proper signs erected thereon. Provided, however, that a combination of a house trailer used as a mobile home, together with its towing vehicle, shall not exceed a total length of 55 feet exclusive of front and rear bumpers. The operation of any vehicle whose gross load, size and/or width exceed the maximum shown on such signs over the roads thus posted shall constitute a misdemeanor: Provided further, that no standard concrete highway, or other highway built of material of equivalent durability, and not less than 18 feet in width, shall be designated as a light-traffic road: Provided further, that the limitations placed on any road

shall not be less than eighty percent (80%) of the standard weight, unless there shall be available an alternate improved route of not more than twenty percent (20%) increase in the distance; provided, however, that such restriction of limitations shall not apply to any county road, farm-to-market road, or any other road of the secondary system: Provided further, that the said limitation that no combination of vehicles coupled together shall consist of more than two units shall not apply to trailers not exceeding three in number drawn by a motor vehicle used by municipalities for the removal of domestic and commercial refuse and street rubbish, but such combination of vehicles shall not exceed a total length of 50 feet inclusive of front and rear bumpers. Provided further, that the said limitation that no combination of vehicles coupled together shall consist of more than two units shall not apply to a combination of vehicles coupled together by a saddle mount device used to transport motor vehicles in a driveway service when no more than two saddle mounts are used and provided further, that equipment used in said combination is approved by the safety regulations of the Interstate Commerce Commission and the safety regulations of the North Carolina Division of Motor Vehicles and the Department of Transportation.

(1979, c. 21, c. 218.)

Editor's Note. —

The first 1979 amendment inserted the first proviso in the first sentence of subsection (e).

The second 1979 amendment added the second sentence to subsection (d).

As the other subsections were not changed by the amendment, only subsections (d) and (e) are set out.

§ 20-118. Weight of vehicles and load. — No vehicle or combination of vehicles shall be moved or operated on any highway or bridge when the gross weight thereof exceeds the limits specified below:

(8) The gross weight of any vehicle having two axles shall not exceed 30,000 pounds, unless used in connection with a combination consisting of four axles or more. For the purpose of determining the maximum weight to be allowed for passenger buses to be operated upon the highways of this State, the Commissioner of Motor Vehicles shall require, prior to the issuance of license, a certificate showing the weight of such bus when fully equipped for the road. Unless the applicant holds a special permit from the Department of Transportation, no license shall be issued to any passenger bus with two axles having a weight, when fully equipped for operation on the highways, of more than 22,500 pounds, and no license shall be issued for any passenger bus with three axles having a weight, when fully equipped for operation on the highways, of more than 30,000 pounds, unless the bus for which application for license is made shall have been licensed in the State of North Carolina prior to the first day of February, 1949. (1977, 2nd Sess., c. 1178.)

Editor's Note. — The 1977, 2nd Sess., amendment, in subdivision (8), added "Unless the applicant holds a special permit from the Department of Transportation" at the beginning of the third sentence and deleted the former last sentence, which read: "No special permits shall be issued for any passenger buses exceeding the foregoing specified weights for each group."

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (8) are set out.

§ 20-118.1. Peace officer may weigh vehicle and require removal of excess load; refusal to permit weighing. — Any peace officer having reason to believe that the weight of a vehicle and load is unlawful is authorized to weigh the same

either by means of North Carolina Department of Transportation portable or stationary scales, and may require that such vehicle be driven to the nearest North Carolina Department of Transportation stationary scales in the event such scales are within five miles. The officer may then require the driver to unload immediately such portion of the load as may be necessary to decrease the gross weight of such vehicle to the maximum therefor specified in this Article. All material so unloaded shall be cared for by the owner or operator of such vehicle at the risk of such owner or operator. Any person who refuses to permit a vehicle being operated by him to be weighed as in this section provided or who refuses to drive said vehicle upon the scales provided for weighing for the purpose of being weighed, shall be guilty of a misdemeanor. No vehicle more than two miles from a North Carolina Department of Transportation stationary scales may be required to be driven to such scales unless the peace officer knows or reasonably suspects the vehicle has driven so as to avoid being weighed at the scales. (1927, c. 148, s. 37; 1949, c. 1207, s. 3; 1951, c. 1013, s. 4; 1979, c. 436, ss. 1, 2.)

Editor's Note. — The 1979 amendment inserted "North Carolina Department of Transportation" near the middle of the first sentence of this section, inserted "North Carolina Department of Transportation stationary" near the end of that sentence, and substituted "five" for "two" near the end of that sentence. The last sentence of this section was added.

§ 20-119. Special permits for vehicles of excessive size or weight.

Cited in C & H Transp. Co. v. North Carolina Div. of Motor Vehicles, 34 N.C. App. 616, 239 S.E.2d 309 (1977).

§ 20-122. Restrictions as to tire equipment. — (a) No vehicle will be allowed to move on any public highway unless equipped with tires of rubber or other resilient material which depend upon compressed air, for support of a load, except by special permission of the Department of Transportation which may grant such special permits upon a showing of necessity. This subsection shall have no application to the movement of farm vehicles on highways.
(1979, c. 515.)

Editor's Note. —
The 1979 amendment rewrote subsection (a), which formerly provided that every solid rubber tire on vehicles moving on the highways of this state should have at least one and a half inches of rubber above the flange around the entire traction surface.

As the other subsections were not changed by the amendment, only subsection (a) is set out.

§ 20-125. Horns and warning devices.

(c) Repealed by Session Laws 1979, c. 653, s. 2, effective October 1, 1979. (1937, c. 407, s. 88; 1951, cc. 392, 1161; 1955, c. 1224; 1959, c. 166, s. 1; c. 494; c. 1170, s. 1; c. 1209; 1965, c. 257; 1975, c. 588; c. 734, s. 15; 1977, c. 52, s. 1; c. 438, s. 1; 1979, c. 653, s. 2.)

Editor's Note. —
The 1979 amendment, effective October 1, 1979, repealed subsection (c), which authorized a special blue warning light for use on vehicles used for law-enforcement purposes and declared it to be unlawful for any other person to have or use such blue lights.

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 20-129. Required lighting equipment of vehicles. — (a) When Vehicles Must Be Equipped. — Every vehicle upon a highway within this State during the period from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of 400 feet ahead, shall be equipped with lighted headlamps and rear lamps as in this section respectively required for different classes of vehicles, and subject to exemption with reference to lights on parked vehicles as declared in G.S. 20-134.

(1979, c. 175.)

Editor's Note. — The 1979 amendment substituted "400" for "200" near the middle of subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Cited in C & H Transp. Co. v. North Carolina Div. of Motor Vehicles, 34 N.C. App. 616, 239 S.E.2d 309 (1977); State v. Stewart, 40 N.C. App. 693, 253 S.E.2d 638 (1979).

§ 20-130.1. Use of red or blue lights on vehicles prohibited; exceptions. — (a) It is unlawful for any person to install or activate or operate a red light in or on any vehicle in this State. As used in this subsection, unless the context requires otherwise, "red light" means an operable red light not sealed in the manufacturer's original package which: (i) Is designed for use by an emergency vehicle or is similar in appearance to a red light designed for use by an emergency vehicle; and (ii) can be operated by use of the vehicle's battery, vehicle's electrical system, or a dry cell battery.

(b) The provisions of subsection (a) of this section do not apply to the following:

(1) A police car;
(2) A highway patrol car;
(3) A vehicle owned by the Wildlife Resources Commission and operated exclusively for law-enforcement purposes;
(4) An ambulance;
(5) A vehicle designed, equipped, and used exclusively for the transportation of human tissues and organs for transplantation;
(6) A fire-fighting vehicle;
(7) A school bus;
(8) A vehicle operated by any member of a municipal or rural fire department in the performance of his duties, regardless of whether members of that fire department are paid or voluntary;
(9) A vehicle of a voluntary lifesaving organization (including the private vehicles of the members of such an organization) that has been officially approved by the local police authorities and which is manned or operated by members of that organization while answering an official call;
(10) A vehicle operated by medical doctors or anesthetists in emergencies;
(11) A motor vehicle used in law-enforcement by the sheriff, or any salaried rural policeman in any county, regardless of whether or not the county owns the vehicle;
(12) A vehicle operated by any county fire marshal or civil preparedness coordinator in the performance of his duties, regardless of whether or not the county owns the vehicle; and
(13) Any lights that may be prescribed by the Interstate Commerce Commission.

(c) It is unlawful for any person to possess a blue light in or on any vehicle in this State. As used in this subsection, unless the context requires otherwise,

"blue light" means an operable blue light not sealed in the manufacturer's original package which:

(1) Is designed for use by an emergency vehicle, or is similar in appearance to a blue light designed for use by an emergency vehicle; and

(2) Can be operated by use of the vehicle's battery, the vehicle's electrical system, or a dry cell battery.

(d) The provisions of subsection (c) of this section do not apply to a publicly owned vehicle used primarily for law-enforcement purposes or any other vehicle used primarily by law-enforcement officers in the performance of their official duties.

(e) Violation of subsection (a) or (c) of this section is a misdemeanor punishable under G.S. 14-3(a). (1943, c. 726; 1947, c. 1032; 1953, c. 354; 1955, c. 528; 1957, c. 65, s. 11; 1959, c. 166, s. 2; c. 1170, s. 2; 1967, c. 651, s. 1; 1971, c. 1214; 1977, c. 52, s. 2; c. 438, s. 2; 1979, c. 653, s. 1; c. 887.)

Editor's Note. —

The first 1979 amendment, effective October 1, 1979, rewrote this section.

The second 1979 amendment inserted "(including the private vehicles of the members of such an organization)" near the beginning of subdivision (9) of subsection (b).

§ 20-130.2. Use of amber lights on certain vehicles. — All wreckers operated on the highways of the State shall be equipped with an amber-colored flashing light which shall be so mounted and located as to be clearly visible in all directions from a distance of 500 feet, which light shall be activated when towing a vehicle. It shall be lawful to equip any other vehicle with a similar warning light including, but not by way of limitation, maintenance or construction vehicles or equipment of the Department of Transportation engaged in performing maintenance or construction work on the roads, maintenance or construction vehicles of any person, firm or corporation, and any other vehicles required to contain a warning light. Radio Emergency Associated Citizens Team (REACT) vehicles may be equipped with amber lights which shall be activated only when the vehicles are parked. (1967, c. 651, s. 2; 1973, c. 507, s. 5; 1977, c. 464, s. 34; 1979, c. 1; c. 765.)

Editor's Note. —

The first 1979 amendment added "which light shall be activated when towing a vehicle" at the end of the first sentence.

The second 1979 amendment added the third sentence.

§ 20-137.2. Operation of vehicles resembling law enforcement vehicles unlawful; punishment. — (a) It is unlawful for any person other than a law-enforcement officer of the State or of any county, municipality, or other political subdivision thereof, with the intent to impersonate a law-enforcement officer, to operate any vehicle, which by its coloration, insignia, lettering, and blue or red light resembles a vehicle owned, possessed, or operated by any law-enforcement agency.

(b) Violation of subsection (a) of this section is a misdemeanor punishable under G.S. 14-3. (1979, c. 567, s. 1.)

Editor's Note. — Session Laws 1979, c. 567, s. 2, makes the act effective January 1, 1980.

Part 10. Operation of Vehicles and Rules of the Road.

§ 20-138. Persons under the influence of intoxicating liquor.

I. GENERAL CONSIDERATION.

Editor's Note. —

For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

For a survey of 1977 criminal law, see 56 N.C.L. Rev. 965 (1978).

A person may be "under the influence" of intoxicants in violation of this section of the motor vehicle laws and yet be quite capable of forming and carrying out a specific intent to kill. State v. Medley, 295 N.C. 75, 243 S.E.2d 374 (1978).

Cited in State v. Hice, 34 N.C. App. 468, 238 S.E.2d 619 (1977); In re Pinyatello, 36 N.C. App. 542, 245 S.E.2d 185 (1978); In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

V. INSTRUCTIONS.

Instructions on Lesser Included, etc. —

Where the State's evidence was positive as to each and every element of operating a motor vehicle under the influence of intoxicating liquor, and there was no conflicting evidence presented which might support a charge on the lesser degree of reckless driving, the trial judge correctly refused to submit requested instructions with respect to reckless driving. State v. Snead, 295 N.C. 615, 247 S.E.2d 893 (1978).

The trial judge, on trial de novo in the superior court, erred in instructing the jury on reckless driving under § 20-140(a) and should have instructed on § 20-140(c), where the defendant had been charged in the district court with drunken driving under this section but was convicted of the lesser included offense under § 20-140(c), since the offense of reckless driving under § 20-140(c) is a specific misdemeanor, and the superior court has no jurisdiction to try an accused for a specific misdemeanor on the warrant of an inferior court unless he is first tried and convicted, and appeals to the superior court from the sentence pronounced. State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979).

§ 20-139.1. Result of a chemical analysis admissible in evidence; presumption.

I. GENERAL CONSIDERATION.

This section relates only, etc. —

The chemical analysis (Breathalyzer) test authorized by this section is, by its express terms, applicable only to criminal actions arising out of the operation of a motor vehicle and has no application to criminal responsibility for homicide. State v. Medley, 295 N.C. 75, 243 S.E.2d 374 (1978).

II. ADMINISTRATION OF TEST.

The purpose, etc. —

In accord with original. See State v. Jordan, 35 N.C. App. 652, 242 S.E.2d 192 (1978).

The principle that underlies the limitation in subsection (b) of this section seems to be that, in the interest of fairness as well as the appearance of fairness, an officer, whose judgment in selecting a defendant for arrest or in making the arrest may be at issue at trial, should not administer the chemical test that will either confirm or refute the soundness of his earlier judgment in causing the arrest. State v. Jordan, 35 N.C. App. 652, 242 S.E.2d 192 (1978).

Officer Who Previously Arrested Defendant on Similar Charge May Administer Test. — Where an officer had nothing to do with defendant's second arrest, his arrest of defendant on a similar charge earlier in the morning did not bring him within the disqualification set out in subsection (b) of this section. State v. Jordan, 35 N.C. App. 652, 242 S.E.2d 192 (1978).

How Mandate of Subsection (b) Can Be Met. — The mandate of subsection (b) of this section can be met in one of three ways: (1) by stipulation between the defendant and the State that the individual who administers the test holds a valid permit issued by the Department of Human Resources; or (2) by offering the permit of the individual who administers the test into evidence and in the event of conviction from which an appeal is taken, by bringing forward the exhibit as a part of the record on appeal; or (3) by presenting any other evidence which shows that the individual who administered the test holds a valid permit issued by the Department of Human Resources. State v. Mullis, 38 N.C. App. 40, 247 S.E.2d 265 (1978).

§ 20-140. Reckless driving.

(d) Any person convicted of violating subsection (a) or subsection (b) of this section shall be punished by imprisonment not to exceed six months or by a fine not to exceed five hundred dollars ($500.00) or by both such imprisonment and fine, in the discretion of the court.

(e) Any person convicted of violating subsection (c) of this section shall be punished by a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) and a term of imprisonment not to exceed six months, which term of imprisonment may be suspended by the trial court upon such terms and conditions as it may see fit provided that such terms and conditions shall include the term and condition that the person so convicted shall successfully complete the program of instruction at an Alcohol and Drug Education Traffic School within 75 days of the date of said conviction, unless the judges make a written finding in the record that:

(1) There is no Alcohol or Drug Education Traffic School within a reasonable distance of the defendant's residence; or
(2) The defendant, because of his history of alcohol or drug abuse, is not likely to benefit from the program of instruction; or
(3) There are specific, extenuating circumstances which make it likely that the defendant will not benefit from the program of instruction.

The trial judge shall enter such specific findings in the record provided that in the case of subdivision (2) above such findings shall include the exact reasons why the defendant is not likely to benefit from the program of instruction and that in the case of subdivision (3) above such findings shall include the specific, extenuating circumstances which make it likely that the defendant will not benefit from the program of instruction. (1937, c. 407, s. 102; 1957, c. 1368, s. 1; 1959, c. 1264, s. 8; 1973, c. 1330, s. 3; 1979, c. 903, ss. 7, 8.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1980, substituted "violating subsection (a) or subsection (b) of this section" for "reckless driving" near the beginning of subsection (d), and added subsection (e).

As subsections (a), (b), and (c) were not changed by the amendment, they are not set out.

I. GENERAL CONSIDERATION.

Quoted in State v. Snead, 35 N.C. App. 724, 242 S.E.2d 530 (1978).

VII. INSTRUCTIONS.

Failure of Court to Instruct on Reckless Driving Was Prejudicial Error. —

Where the defendant, who had obviously been drinking, was observed driving at an excessive speed with at least half the car over the center line at times and weaving severely, this was some evidence from which a jury might find that defendant was driving after consuming "such quantity of intoxicating liquor as directly and visibly affects his operation of said vehicle." The jury should, therefore, have been instructed concerning the statutory offense of reckless driving under subsection (c) of this section and the failure of the court to do so was prejudicial error. State v. Davis, 37 N.C. App. 735, 247 S.E.2d 14 (1978).

Trial Court Correctly Refused Reckless Driving Instruction. — Where the State's evidence was positive as to each and every element of operating a motor vehicle under the influence of intoxicating liquor, and there was no conflicting evidence presented which might support a charge on the lesser degree of reckless driving, the trial judge correctly refused to submit requested instructions with respect to reckless driving. State v. Snead, 295 N.C. 615, 247 S.E.2d 893 (1978).

Charge on Lesser Included, etc. —

The trial judge, on trial de novo in the superior court, erred in instructing the jury on reckless driving under subsection (a) of this section and should have instructed on subsection (c) of this section, where the defendant had been charged in the district court with drunken driving under § 20-138 but was convicted of the lesser included offense under subsection (c) of this section, since the offense of reckless driving under that subsection is a specific misdemeanor, and the superior court has no jurisdiction to try an accused for a specific misdemeanor on the

warrant of an inferior court unless he is first tried and convicted, and appeals to the superior court from the sentence pronounced. State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979).

§ 20-141. Speed restrictions.

I. GENERAL CONSIDERATION.

N.C.G.S. § 20-141(m) Does Create a Criminal Offense of Failure to Decrease Speed as Necessary to Avoid a Collision as Well as a "Standard of Care" in Establishing Civil Negligence. — See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, Winston-Salem, N.C., 48 N.C.A.G. 2 (1979).

Applied in State v. Spellman, 40 N.C. App. 591, 253 S.E.2d 320 (1979).

Cited in Holt v. City of Statesville, 35 N.C. App. 381, 241 S.E.2d 362 (1978); Cockrell v. Cromartie Transp. Co., 295 N.C. 444, 245 S.E.2d 497 (1978).

§ 20-141.1. Speed limits in school zones. — The Board of Transportation or local authorities within their respective jurisdictions may, by ordinance, set speed limits lower than those designated in G.S. 20-141 for areas adjacent to or near a public, private or parochial school. Limits set pursuant to this section shall become effective when signs are erected giving notice of the school zone, the authorized speed limit, and the days and hours when the lower limit is effective, or by erecting signs giving notice of the school zone, the authorized speed limit and which indicate the days and hours the lower limit is effective by an electronic flasher operated with a time clock. Limits set pursuant to this section may be enforced only on days when school is in session, and no speed limit below 20 miles per hour may be set under the authority of this section. (1977, c. 902, s. 2; 1979, c. 613.)

Editor's Note. —

The 1979 amendment added "or by erecting signs giving notice of the school zone, the authorized speed limit and which indicate the days and hours the lower limit is effective by an electronic flasher operated with a time clock" at the end of the second sentence of this section.

§ 20-141.3. Unlawful racing on streets and highways.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 31, effective Jan. 1, 1981, will amend subsections (d) and (e) to read as follows:

"(d) The Commissioner of Motor Vehicles shall revoke the driver's license or privilege to drive of every person convicted of violating the provisions of subsection (a) or subsection (c) of this section, said revocation to be for three years; provided any person whose license has been revoked under this section may apply for a new license after 18 months from revocation. Upon filing of such application the Division may issue a new license upon satisfactory proof that the former licensee has been of good behavior for the past 18 months and that his conduct and attitude are such as to entitle him to favorable consideration and upon such terms and conditions which the Division may see fit to impose for the balance of the three-year revocation period, which period shall be computed from the date of the original revocation.

"(e) The Commissioner may suspend the driver's license or privilege to drive of every person convicted of violating the provisions of subsection (b) of this section. Such suspension shall be for a period of time within the discretion of the Commissioner, but not to exceed one year."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the

provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

Violation of the racing statute is negligence per se. Harrington v. Collins, 40 N.C. App. 530, 253 S.E.2d 288 (1979).

Passenger Must Actively Participate, Not Merely Fail to Speak, to Be Negligent. — In order for a passenger to be a party to the offense under subsection (a) of this section and to be jointly and concurrently negligent, he must do more than fail to speak, remonstrate or leave the car. The evidence must show the passenger in some way participated or was involved in the race in order to constitute acquiescence. Harrington v. Collins, 40 N.C. App. 530, 253 S.E.2d 288 (1979).

Defendant's participation in a prearranged automobile race constituted willful or wanton conduct and was, as a matter of law, a proximate cause of injuries received by plaintiff passenger in a collision during the race. Harrington v. Collins, 40 N.C. App. 530, 253 S.E.2d 288 (1979).

§ 20-141.4. Death by vehicle.

Editor's Note. — For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

State Need Not Prove Any Intentional or Reckless Conduct. — A jury instruction which, in distinguishing death by vehicle from involuntary manslaughter, merely pointed out that with respect to the offense of death by vehicle the State is not required to prove any intentional or reckless conduct on the part of the defendant, comported with the definition in this section. State v. Thompson, 37 N.C. App. 444, 246 S.E.2d 81, cert. denied, 295 N.C. 652, 248 S.E.2d 257 (1978).

The failure of the trial judge to allow the jury to consider the lesser degree of homicide of death by vehicle constituted prejudicial error that was not cured by a verdict of guilty of the more serious crime of involuntary manslaughter, where the evidence would have permitted the jury to find the defendant guilty of death by vehicle. State v. Baum, 33 N.C. App. 633, 236 S.E.2d 31, cert. denied, 293 N.C. 253, 237 S.E.2d 536 (1977).

Expert Testimony as to Cause of Death Unnecessary. — It is not always necessary to have an expert testify as to the cause of death where all of the facts disclose a set of circumstances from which any person of average intelligence could be satisfied beyond a reasonable doubt that the fatality occurred in the collision. State v. Smith, 37 N.C. App. 64, 245 S.E.2d 227 (1978).

Cited in State v. Hice, 34 N.C. App. 468, 238 S.E.2d 619 (1977).

§ 20-146. Drive on right side of highway; exceptions.

Negligence Per Se Rule Inapplicable to Police. — The principle that violation of this section constitutes negligence per se is not applicable to law-enforcement officers, who are not to be deemed negligent merely for failure to observe the rules of the road while engaged in the pursuit of lawbreakers. Wade v. Grooms, 37 N.C. App. 428, 246 S.E.2d 17 (1978).

§ 20-150. Limitations on privilege of overtaking and passing.

(e) The driver of a vehicle shall not overtake and pass another on any portion of the highway which is marked by signs, markers or markings placed by the Department of Transportation stating or clearly indicating that passing should not be attempted.

(1979, c. 472.)

Editor's Note. —

The 1979 amendment, effective July 1, 1979, deleted "or" before "markers" and added "or markings" after that word near the middle of subsection (e).

As the other subsections were not changed by the amendment, only subsection (e) is set out.

Cited in Bell v. Brueggemyer, 35 N.C. App. 658, 242 S.E.2d 392 (1978).

§ 20-150.1. When passing on the right is permitted.

Cited in Oliver v. Royall, 36 N.C. App. 239, 243 S.E.2d 436 (1978).

§ 20-154. Signals on starting, stopping or turning.

I. GENERAL CONSIDERATION.

Cited in Cardwell v. Ware, 36 N.C. App. 366, 243 S.E.2d 915 (1978).

II. TURNING MOVEMENTS.

Turn Must Be Delayed until It Can Be Made in Safety. — Without regard to whether the turning driver gives the appropriate signal, other motorists affected have the right to assume that he will delay his movement until it may be made in safety. Brown v. Brown, 38 N.C. App. 607, 248 S.E.2d 397 (1978).

III. SIGNALS.

Signal Unnecessary Where Turn Will Not Affect Other Vehicles. — Subsection (a) of this section does not require that a motorist give a signal before turning unless the surrounding circumstances afford reasonable grounds for apprehending that the turn may affect the operation of another vehicle. Brown v. Brown, 38 N.C. App. 607, 248 S.E.2d 397 (1978).

But under circumstances making subsection (a) of this section applicable, the statute imposes both the duty of giving the required turn signal and the duty to see prior to turning that such movement can be made in safety. Brown v. Brown, 38 N.C. App. 607, 248 S.E.2d 397 (1978).

IV. NEGLIGENCE AND PROXIMATE CAUSE.

Violation to Be Considered, etc. —

In accord with 1st paragraph in original. See Mintz v. Foster, 35 N.C. App. 638, 242 S.E.2d 181 (1978).

§ 20-158. Vehicle control signs and signals.

(b) Control of Vehicles at Intersections. —

(1) When a stop sign has been erected or installed at an intersection, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main-traveled or through highway. When stop signs have been erected at three or more entrances to an intersection, the driver, after stopping in obedience thereto, may proceed with caution.

(2) Vehicles facing a red light from a steady or strobe beam stoplight shall not enter the intersection while the steady or strobe beam stoplight is emitting a red light; provided that, except where prohibited by an appropriate sign, vehicular traffic facing a red light, after coming to a complete stop at the intersection, may enter the intersection to make a right turn but such vehicle shall yield the right-of-way to pedestrians and to other traffic using the intersection. When the stoplight is warned that a red light will be immediately forthcoming. When the stoplight is emitting a steady green light, vehicles may proceed with due care through the intersection subject to the rights of pedestrians and other vehicles as may otherwise be provided by law.

(3) When a flashing red light has been erected or installed at an intersection, approaching vehicles facing the red light shall stop and yield the right-of-way to vehicles in or approaching the intersection. The right to proceed shall be subject to the rules applicable to making a stop at a stop sign.

(4) When a flashing yellow light has been erected or installed at an intersection, approaching vehicles facing the yellow flashing light may proceed through the intersection with caution, yielding the right-of-way to vehicles in or approaching the intersection.

(5) When a stop sign, stoplight, flashing light, or other traffic-control device authorized by subsection (a) requires a vehicle to stop at an intersection, the driver shall stop at an appropriately marked stop line, or if none, before entering a marked crosswalk, or if none, before entering the intersection at the point nearest the intersecting street where the driver has a view of approaching traffic on the intersecting street.

(1979, c. 298, s. 1.)

Editor's Note. —

The 1979 amendment rewrote the first sentence of subdivision (b)(2), which formerly required vehicles facing a steady red light at an intersection to come to a complete stop. Also, in subdivision (b)(2), the amendment substituted "are" for "shall be" near the middle of the second sentence, deleted "and that vehicles may not enter the intersection on such a red light; provided, that except where prohibited by appropriate sign, vehicular traffic facing a steady red light may enter an intersection to make a right turn after coming to a complete stop and yielding the right-of-way to pedestrians and to other traffic using the intersection" at the end of the second sentence, and inserted "with due care" near the middle of the third sentence.

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 20-161. Stopping on highway prohibited; warning signals; removal of vehicles from public highway.

Cited in Digsby v. Gregory, 35 N.C. App. 59, 240 S.E.2d 491 (1978).

§ 20-162. Parking in front of fire hydrant, fire station or private driveway. — (a) No person shall park a vehicle or permit it to stand, whether attended or unattended, upon a highway in front of a private driveway or within 15 feet in either direction of a fire hydrant or the entrance to a fire station, nor within 25 feet from the intersection of curb lines or if none, then within 15 feet of the intersection of property lines at an intersection of highways; provided, that local authorities may by ordinance decrease the distance within which a vehicle may park in either direction of a fire hydrant.

(b) No person shall park a vehicle or permit it to stand, whether attended or unattended, upon any public vehicular area, street, highway or roadway in any area designated as a fire lane. This prohibition includes designated fire lanes in shopping center or mall parking lots and all other public vehicular areas. The prima facie rule of evidence created by G.S. 20-162.1 is applicable to prosecutions for violation of this section. The owner of a vehicle parked in violation of this subsection shall be deemed to have appointed any State, county or municipal law-enforcement officer as his agent for the purpose of arranging for the transportation and safe storage of such vehicle. No law-enforcement officer removing such a vehicle shall be held criminally or civilly liable in any way for any acts or omissions arising out of or caused by carrying out or enforcing any provisions of this subsection, unless the conduct of the officer amounts to wanton conduct or intentional wrongdoing. (1937, c. 407, s. 124; 1939, c. 111; 1979, c. 552.)

Editor's Note. — The 1979 amendment, effective July 1, 1979, designated the former section as subsection (a) and added subsection (b).

§ 20-162.1. Prima facie rule of evidence for enforcement of parking regulations.

Local Modification. — City of Clinton: 1979, c. 326.

§ 20-166. Duty to stop in event of accident or collision; furnishing information or assistance to injured person, etc.; persons assisting exempt from civil liability.

Cross Reference. — As to immunity from liability of any person rendering first aid or emergency health care treatment to an unconscious, ill or injured person in certain circumstances, see § 90-21.14.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 32, effective Jan. 1, 1981, will amend subsections (b) and (c) of this section to read as follows:

"(b) The driver of any vehicle involved in an accident or collision resulting in damage to property and in which there is not involved injury or death of any person shall immediately stop his vehicle at the scene of the accident or collision and shall give his name, address, driver's license number and the registration number of his vehicle to the driver or occupants of any other vehicle involved in the accident or collision or to any person whose property is damaged in the accident or collision; provided that if the damaged property is a parked and unattended vehicle and the name and location of the owner is not known to or readily ascertainable by the driver of the responsible vehicle, the said driver shall furnish the information required by this subsection to the nearest available peace officer, or, in the alternative, and provided he thereafter within 48 hours fully complies with G.S. 20-166.1(c), shall immediately place a paper-writing containing said information in a conspicuous place upon or in the damaged vehicle and, provided that if the damaged property is a guardrail, utility pole, or other fixed object owned by the Department of Transportation, a public utility, or other public service corporation to which report cannot readily be made at the scene, it shall be sufficient if the responsible driver shall furnish the information required to the nearest peace officer or make written report thereof containing said information by U.S. certified mail, return receipt requested, to the N.C. Division of Motor Vehicles within five days following said collision. Any person violating the provisions of this subsection shall be guilty of a misdemeanor and fined or imprisoned for a period of not more than two years, or both, in the discretion of the court.

"(c) The driver of any vehicle involved in any accident or collision resulting in injury or death to any person shall also give his name, address, driver's license number and the registration number of his vehicle to the person struck or the driver or occupants of any vehicle collided with, and shall render to any person injured in such accident or collision reasonable assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by the injured person, and it shall be unlawful for any person to violate this provision, and such violator shall be punishable as provided in G.S. 20-182."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

Cited in State v. Tise, 39 N.C. App. 495, 250 S.E.2d 674 (1979).

§ 20-166.1. Reports and investigations required in event of collision.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 33, effective Jan. 1, 1981, will amend subsection (c) of this section to read as follows:

"(c) Notwithstanding any other provisions of this section, the driver of any motor vehicle which collides with another motor vehicle left parked or unattended on any street or highway of this State shall within 48 hours report the collision to the owner of such parked or unattended motor vehicle. Such report shall include the time, date and place of the collision, the driver's name, address, driver's license number and the registration number of the vehicle being operated by the driver at the time of the collision, and such report may be oral or

in writing. Such written report must be transmitted to the current address of the owner of the parked or unattended vehicle by United States certified mail, return receipt requested, and a copy of such report shall be transmitted to the North Carolina Division of Motor Vehicles.

No report, oral or written, made pursuant to this Article shall be competent in any civil action except to establish identity of the person operating the moving vehicle at the time of the collision referred to therein.

Any person who violates this subsection is guilty of a misdemeanor and shall be punishable by fine or imprisonment, or both, in the discretion of the court."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

Controlled substances, found inside a paper bag at the scene of an automobile accident, were not the products of an unreasonable search and seizure in violation of the defendant's Fourteenth Amendment rights where, under the circumstances, it was reasonable for a state trooper to look inside the paper bag to determine whether there was anything valuable belonging to the owner that the trooper should hold for safekeeping. State v. Francum, 39 N.C. App. 429, 250 S.E.2d 705 (1979).

§ 20-169. Powers of local authorities. — Local authorities, except as expressly authorized by G.S. 20-141 and 20-158, shall have no power or authority to alter any speed limitations declared in this Article or to enact or enforce any rules or regulations contrary to the provisions of this Article, except that local authorities shall have power to provide by ordinances for the regulation of traffic by means of traffic or semaphores or other signaling devices on any portion of the highway where traffic is heavy or continuous and may prohibit other than one-way traffic upon certain highways, and may regulate the use of the highways by processions or assemblages and except that local authorities shall have the power to regulate the speed of vehicles on highways in public parks, but signs shall be erected giving notices of such special limits and regulations. Signaling devices of a stop-light nature erected pursuant to this section and which emit alternate red and green lights shall be so arranged and placed that the red light shall appear at the top and the green light shall appear at the bottom of the signaling unit. Provided, that all traffic signs, signals, markings, islands, and all other traffic-control devices installed or erected on streets or highways on the State highway system within the corporate limits of a municipality shall be subject to the approval of the Department of Transportation and be installed or erected in substantial conformance with the specifications set forth in the Manual on Uniform Traffic Control Devices for Streets and Highways, or any subsequent revisions of the same, published by the United States Department of Commerce, Bureau of Public Roads and dated June, 1961. Provided further that the Department of Transportation is authorized and directed to assume the cost of installing and erecting such traffic-control devices provided the same are installed and erected with the approval of the Department of Transportation and in conformity with this section, and the Department of Transportation is authorized and directed to assume the costs of altering existing traffic-control devices on the State highway system to conform to the said specifications set out above. (1937, c. 407, s. 131; 1949, c. 947, s. 2; 1955, c. 384, s. 2; 1963, c. 559; 1973, c. 507, s. 5; 1979, c. 298, s. 2.)

Editor's Note. —

The 1979 amendment substituted "Department of Transportation" for "Board of Transportation" in the third sentence and in three places in the fourth sentence.

Part 11. Pedestrians' Rights and Duties.

§ 20-174. Crossing at other than crosswalks; walking along highway.

A violation of subsection (e) of this section may not be considered negligence per se, and the jury, if they find as a fact that subsection (e) of this section is violated, must consider the violation along with all other facts and circumstances and decide whether, when so considered, the person found guilty of such violation has breached his common law and statutory duty of exercising ordinary care. Pope v. Deal, 39 N.C. App. 196, 249 S.E.2d 866 (1978).

The failure of a pedestrian to yield, etc. — In accord with 5th paragraph in original. See Lewis v. Dove, 39 N.C. App. 599, 251 S.E.2d 669 (1979).

§ 20-174.1. Standing, sitting or lying upon highways or streets prohibited.

The legislative intent, etc. — In accord with 2nd paragraph in original. See Self v. Dixon, 39 N.C. App. 679, 251 S.E.2d 661 (1979).

Conduct Not Constituting Violation of Section. — Where the evidence showed that the plaintiff in a personal injury action stood "half on and half off" the pavement for the purpose of picking up a rag dropped by her niece and that she saw the defendant's approaching automobile but was unable to get off the pavement before being struck, there was not sufficient evidence tending to show that the plaintiff willfully placed her body on the street to impede or block traffic in violation of this section. Self v. Dixon, 39 N.C. App. 679, 251 S.E.2d 661 (1979).

Part 12. Sentencing; Penalties.

§ 20-176. Penalty for misdemeanor.

This Section Is Inapplicable to § 20-140. — The trial judge, on trial de novo in the superior court, erred in instructing the jury on reckless driving under § 20-140(a) and should have instructed on § 20-140(c), where the defendant had been charged in the district court with drunken driving under § 20-138 but was convicted of the lesser included offense under § 20-140(c), since the offense of reckless driving under § 20-140(c) is a specific misdemeanor, and the superior court has no jurisdiction to try an accused for a specific misdemeanor on the warrant of an inferior court unless he is first tried and convicted, and appeals to the superior court from the sentence pronounced. State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979).

§ 20-177. Penalty for felony.

Cross Reference. — For statute providing the maximum punishment for felonies, effective July 1, 1980, see § 14-1.1.

Session Laws 1979, c. 760, s. 6, provides: "This act shall become effective on July 1, 1980, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Amendment Effective July 1, 1980. — Session Laws 1979, c. 760, s. 5, effective July 1, 1980, will amend this section to read as follows:

"**§ 20-177. Penalty for felony. —** Any person who shall be convicted of a violation of any of the provisons of this Article herein or by the laws of this State declared to constitute a felony shall, unless a different penalty is prescribed herein or by the laws of this State, be punished as a Class I felon."

§ 20-179. Penalty for driving or operating vehicle while under the influence of intoxicating liquor, narcotic drugs, or other impairing drugs; limited driving permits for first offenders. — (a) Every person who is convicted of violating G.S. 20-138(a), 20-138(b), 20-139(a), or 20-139(b) shall be punished as follows:

(1) For a conviction of a first offense, a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court;
(2) For a conviction of a second offense, imprisonment for not less than three days nor more than one year and a fine not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00);
(3) For a conviction of a third or subsequent offense, imprisonment for not less than three days nor more than two years and a fine of not less than five hundred dollars ($500.00).

The first three days of imprisonment pursuant to subdivisions (2) and (3) above shall not be subject to suspension or parole; provided that in lieu of such imprisonment pursuant to subdivision (2) above the court may allow the defendant to participate in a program for alcohol or drug rehabilitation approved for this purpose by the Department of Human Resources; and upon defendant's successful completion of such program the court may suspend all or any part of the term of imprisonment. Convictions for offenses occurring prior to July 1, 1978, or more than three years prior to the current offense shall not be considered prior offenses for the purpose of subdivisions (2) and (3) above.

(1977, 2nd Sess., c. 1221, s. 1.)

(b) (1) Upon a first conviction only of any offense included in G.S. 20-138 or 20-139, and subject to the provisions of this subsection (b) the trial judge may issue a limited driving privilege when feasible and if the person convicted requests that he do so. The limited privilege, if issued, shall contain a condition that the person convicted enroll in and successfully complete, within 75 days of the date of the issuance of said limited privilege, the program of instruction at an Alcohol and Drug Education Traffic School approved by the Department of Human Resources pursuant to G.S. 20-179.2. The limited privilege shall contain a provision allowing the person convicted to drive to and from classes required for successful completion of such program of instruction. In addition, the judge may include in the limited privilege conditions allowing the person convicted to drive a motor vehicle for proper purposes directly connected with the health, education and welfare of the person convicted and his family. The judge, in establishing the limited driving privilege, may impose restrictions as to the days, hours, types of vehicles, routes and geographic boundaries and specific purposes for which the limited driving privilege is issued. The trial judge may issue a limited driving privilege that does not contain a condition that the defendant successfully complete the program of instruction at an Alcohol and Drug Education Traffic School if:

a. There is no Alcohol or Drug Education Traffic School within a reasonable distance of the defendant's residence; or
b. The defendant because of his history of alcohol or drug abuse, is not likely to benefit from the program of instruction; or
c. There are specific, extenuating circumstances which make it likely

The trial judge shall enter such specific findings in the record provided that in the case of subsection b. above such findings shall include the exact reasons why the defendant is not likely to benefit from the program of instruction and that in the case of subsection c. above such findings shall include the specific, extenuating circumstances which make it likely that the defendant will not benefit from the program of instruction.

For the purposes of determining whether the conviction is a first conviction, no prior offense occurring more than seven years before the date of the current offense shall be considered. In addition, convictions

for violations of any provision of G.S. 20-138(a), 20-138(b), 20-139(a), or 20-139(b) shall be considered previous convictions. Convictions prior to January 1, 1980, shall be considered for purposes of this subsection.

The limited driving privilege and the restrictions imposed thereon shall be specifically recorded in a written judgment of the court, shall be signed by the trial judge and shall be affixed with the seal of the court. The written judgment shall be as near as practicable in the format established by G.S. 20-179(b)(2). A notice of the conviction and a copy of the judgment must be transmitted to the Division of Motor Vehicles, along with any operator's or chauffeur's license in the possession of the person convicted.

The limited driving privilege is valid for such length of time, not to exceed six months, as shall be set forth in the judgment of the trial judge. A limited privilege that does not contain a condition that the defendant successfully complete the program of instruction at an Alcohol or Drug Education Traffic School is valid for such length of time, not to exceed 12 months, as shall be set forth in the judgment of the trial court. Such permit shall constitute a valid license to operate a motor vehicle upon the streets and highways of this or any other state in accordance with the restrictions noted thereon. The holder of a limited driving privilege is subject to all provisions of this Chapter concerning operator's or chauffeur's licenses which are not by their nature inapplicable.

A limited driving privilege issued pursuant to this subsection does not authorize a person to drive while the license of such person is also revoked pursuant to G.S. 20-16.2 for failure to take a chemical test of the blood or breath to determine blood alcoholic content.

(2) The judgment issued by the trial judge as herein permitted shall as near as practical be in the form and contents as follows:

STATE OF NORTH CAROLINA
COUNTY OF . . . . . .

IN THE GENERAL COURT OF JUSTICE
RESTRICTED DRIVING PRIVILEGES

This cause coming on to be heard and being heard before the Honorable . . . . . ., Judge presiding, and it appearing to the Court that the defendant, ... , has been convicted of the offense of (describe offense under G.S. 20-138 or 20-139 or as appropriate), and it further appearing to the Court that the defendant should be issued a limited driving privilege and is entitled to the issuance of a limited driving privilege under and by the authority of G.S. 20-179(b);

Now, therefore, it is ordered, adjudged and decreed that the defendant be allowed to operate a motor vehicle under the following conditions and under no other circumstances.

Name: . . . . . .
Address: . . . . . .
Race: . . . . . Sex: . . . . . .
Height: . . . . . Weight: . . . . . .
Color of Hair: . . . . . Color of Eyes: . . . . . .
Birth Date: . . . . . .
Driver's License Number: . . . . . .

CONDITIONS OF RESTRICTION

1. The defendant must successfully complete the approved program of instruction at an Alcohol and Drug Education Traffic School within 75 days from the date when this limited privilege was issued.

2. Geographical restrictions: . . . . . .
. . . . . .
3. Hours of restriction: . . . . . .
. . . . . .
4. Type(s) of vehicles that may be operated: . . . . . .
. . . . . .
. . . . . .
5. Other restrictions: . . . . . .
. . . . . .
. . . . . .
. . . . . .

This limited license shall be effective from . . . . . to . . . . . subject to further orders as the court in its discretion (month) (day), (year) may deem necessary and proper.

Issued on this . . . . . day of . . . . . , 19 . . . .

. . . . . (Judge Presiding)

Accepted on this . . . . . day of . . . . . , 19 . . . .

. . . . . (Signature of Licensee)

(3) If a person is convicted in another state or county or in a federal court of an offense that is equivalent to one of the provisions of G.S. 20-138(a), 20-138(b), 20-139(a) or 20-139(b), and if the person's North Carolina driver's license is revoked as a result of that conviction, the person so convicted may apply to the presiding or resident judge of the superior court or a district court judge of the district in which he resides for a limited driving privilege. Upon such application the judge may issue a limited driving privilege in the same manner as if he were the trial judge.

(4) A district court judge may modify a limited driving privilege if:

a. The holder of the limited privilege petitions the court for a modification of the privilege; and
b. The privilege was issued by a district court judge; and
c. The privilege was issued in the county in which the district judge is conducting court.

A superior court judge may modify a limited driving privilege if:

a. The holder of the limited privilege petitions the court for a modification of the privilege; and
b. The privilege was issued by a superior court judge; and
c. The privilege was issued in the county in which the superior court judge is conducting court.

(5) Any violation of the conditions or restrictions as set forth in the judgment of the trial court allowing such privileges, other than the failure to successfully complete the prescribed program of instruction at an Alcohol and Drug Education Traffic School, shall constitute the offense of driving while license revoked as set forth in G.S. 20-28(a). When a person is charged with operating a motor vehicle in violation of the restrictions, the limited driving privilege shall be suspended pending the final disposition of the charge.

Failure to successfully complete an approval program of instruction at an Alcohol and Drug Education Traffic School shall constitute grounds to revoke the limited privilege for the remainder of the time for which such limited privilege was issued. Failure to successfully complete an approved program of instruction at an Alcohol and Drug Education Traffic School shall not constitute the offense of driving while license revoked. For purposes of this subsection, the phrase

"failure to successfully complete the prescribed program of instruction at an Alcohol and Drug Education Traffic School" includes failure to attend scheduled classes without a valid excuse, failure to complete the course within 75 days of the issuance of the limited privilege, willful failure to pay the required fee for the course, or any other manner in which the person fails to complete the course successfully. The instructor of the course to which a person is assigned shall report any failure of a person to successfully complete the program of instruction to the court which issued the limited driving privilege. The court shall revoke the limited privilege. The person possessing the limited privilege may obtain a hearing prior to revocation.

(6) Notwithstanding any other provisions of this section, no person who has willfully refused to submit to a chemical test upon request of the officer as provided by G.S. 20-16.2 may be granted a limited driving privilege or license while the driving privilege of such person is revoked pursuant to the provisions of G.S. 20-16.2(c) for the willful refusal of such person to submit to such chemical test.

(7) This subsection is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina. (1937, c. 407, s. 140; 1947, c. 1067, s. 18; 1967, c. 510; 1969, c. 50; c. 1283, ss. 1-5; 1971, c. 619, s. 16; c. 1133, s. 1; 1975, c. 716, s. 5; 1977, c. 125; 1977, 2nd Sess., c. 1222, s. 1; 1979, c. 453, ss. 1, 2; c. 903, ss. 1, 2.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective March 1, 1979, rewrote subsection (a).

The first 1979 amendment substituted "court" for "trial judge" in the first sentence of subdivision (4) of subsection (b) as it stood before the second 1979 amendment and added at the end of subdivision (1) of subsection (b) a sentence reading as follows: "The holder of a limited driver's privilege or license may petition either the superior court, if the limited driver's privilege or license was granted in superior court, or the district court, if the limited driver's privilege or license was granted in district court, of the county of issuance of his limited permit to modify his permit at its discretion."

The second 1979 amendment, effective Jan. 1, 1980, substituted "G.S. 20-138(a), G.S. 20-138(b)" for "G.S. 20-138" in the introductory paragraph of subsection (a), and rewrote subsection (b) to read as set out above.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 34, will amend subdivision (b) to read as follows:

"(b) (1) Upon a first conviction only, the trial judge may when feasible allow a limited driving privilege or license to the person convicted for proper purposes reasonably connected with the health, education and welfare of the person convicted and his family. For purposes of determining whether conviction is a first conviction, no prior offense occurring more than 10 years before the date of the current offense shall be considered. The judge may impose upon such limited driving privilege any restrictions as in his discretion are deemed advisable including, but not limited to, conditions of days, hours, types of vehicles, routes, geographical boundaries and specific purposes for which limited driving privilege is allowed. Any such limited driving privilege allowed and restrictions imposed thereon shall be specifically recorded in a written judgment which shall be as near as practical to that hereinafter set forth and shall be signed by the trial judge and shall be affixed with the seal of the court and shall be made a part of the records of the said court. A copy of said judgment shall be transmitted to the Division of Motor Vehicles along with any driver's license in the possession of the person convicted and a notice of the conviction. Such permit issued hereunder shall be valid for such length of time as shall be set forth in the judgment of the trial judge. Such permit shall constitute a valid license to operate motor vehicles of the class or type that would be allowed by the person's license if it were not currently

revoked upon the streets and highways of this or any other state in accordance with the restrictions noted thereon and shall be subject to all provisions of law relating to drivers' licenses not by their nature rendered inapplicable.

(2) The judgment issued by the trial judge as herein permitted shall as near as practical be in form and contents as follows:

STATE OF NORTH CAROLINA
COUNTY OF . . . . . .

IN THE GENERAL COURT
OF JUSTICE
RESTRICTED DRIVING
PRIVILEGES

This cause coming on to be heard and being heard before the Honorable . . . . . ., Judge presiding, and it appearing to the Court that the defendant, ..., has been convicted of the offense of (describe offense under G.S. 20-138, 20-139(a) or 20-139(b) or as appropriate), and it further appearing to the court that the defendant should be issued a restrictive driving license and is entitled to the issuance of a restrictive driving privilege under and by the authority of G.S. 20-179(b);

Now, therefore, it is ordered, adjudged and decreed that the defendant be allowed to operate a motor vehicle under the following conditions and under no other circumstances.

Name: . . . . . .
Race: . . . . . Sex: . . . . . .
Height: . . . . . Weight: . . . . . .
Color of Hair: . . . . . Color of Eyes: . . . . . .
Birth Date: . . . . . .
Driver's License Number: . . . .
Signature of Licensee: . . . . . .
Conditions of Restriction: . . . .
Type of Vehicle: . . . . . .
Geographic Restrictions: . . . . . .
Hours of Restriction: . . . . . .
Other Restrictions: . . . . . .

This limited license shall be effective from . . . . . to . . . . . subject to further orders as the court in its discretion may deem necessary and proper.

This the . . . . . day of . . . . . ., 19 . . . .

. . . . . .
(Judge Presiding)

(3) Upon conviction of such offense outside the jurisdiction of this State the person so convicted may apply to the presiding or resident judge of the superior court or district court judge of the district in which he resides for limited driving **privileges hereinbefore defined. Upon** such application the judge shall have the authority to issue such limited driving privileges in the same manner as if he were the trial judge.

(4) Any violation of the restrictive driving privileges as set forth in the judgment of the trial judge allowing such privileges shall constitute the offense of driving while license has been revoked as set forth in G.S. 20-28. Whenever a person is charged with operating a motor vehicle in violation of the restrictions, the limited driving privilege shall be suspended pending the final disposition of the charge.

(5) This section is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina."

A Fee Charged for an Alcohol Rehabilitation Course Offered Pursuant to G.S. 20-179(a)(3) Must Not Be Imposed by the Court as a Part of the Cost and Collected by the Clerk and Distributed to the Provider of the Rehabilitation Course. — See opinion of Attorney General to Honorable George M. Britt, Chief District Judge, Seventh Judicial District, 48 N.C.A.G. 2 (1979).

Cited in In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

§ 20-179.2. Alcohol and drug education traffic schools curriculum approved by Commission for Mental Health and Mental Retardation Services; responsibilities of the Department of Human Resources; fees. — (a) The Commission for Mental Health and Mental Retardation Services shall establish standards and guidelines for the curriculum and operation of local alcohol and drug education traffic school programs. The Department shall oversee the development of a statewide system of schools and shall insure that schools are available in all localities of the State as soon as is practicable.

(1) A fee of one hundred dollars ($100.00) shall be paid by all persons enrolling in an Alcohol and Drug Education Traffic School program established pursuant to this section. That fee shall be paid to the clerk

of court in the county in which the person was convicted. The amounts received by the clerk from the fees shall be remitted in monthly payments to the area mental health, mental retardation, and substance abuse authority located in the catchment area where the court is located. Area mental health, mental retardation, and substance abuse authorities will remit five percent (5%) of the above fees from the clerks of court to the Department of Human Resources on a monthly basis. Fees received by the Department of Human Resources may only be used in supporting and administering alcohol and drug education traffic schools. Any excess funds will revert to the General Fund.

(2) The Department of Human Resources shall have the authority to approve programs to be implemented by area mental health, mental retardation, and substance abuse authorities. Area mental health, mental retardation, and substance abuse authorities may subcontract for the delivery of alcohol and drug education traffic school program services. The department shall have the authority to approve budgets and contracts with public and private governmental and nongovernmental bodies for the operation of such schools.

(3) All fees retained by the area mental health, mental retardation, and substance abuse authorities from the clerks of court shall be placed in a nonreverting fund. Moneys in that fund shall be disbursed for the operation, evaluation and administration of alcohol and drug education traffic school programs. Any excess funds shall be used to fund other Drug and Alcohol programs.

(4) All fees collected by the area mental health, mental retardation, and susbtance abuse authorities from the clerks of court may not be used in any manner to match other State funds or to be included in any computation for State formula-funded allocations.

(b) Willful failure to pay the fee is one ground for a finding that a person given a limited privilege has not successfully completed the course. Willful failure to pay the fee does not include cases in which the court determines the person is unable to pay. (1979, c. 903, s. 3.)

Editor's Note. — Session Laws 1979, c. 903, s. 15, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 903, s. 14, provides: "There shall be an evaluation of the effectiveness of the course of instruction at alcohol and drug education traffic schools, and the result of that evaluation shall be made available to the 1983 Session of the General Assembly."

Pursuant to Session Laws 1979, c. 358, s. 26, "area mental health, mental retardation and substance abuse authority(ies)" has been substituted for "area mental health authority(ies)" in this section as enacted by Session Laws 1979, c. 903, s. 3.

§ 20-182. Penalty for failure to stop in event of accident involving injury or death to a person.

Cross Reference. —

For statute providing the maximum punishment for felonies, effective July 1, 1980, see § 14-1.1.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

Session Laws 1979, c. 760, s. 6, provides: "This act shall become effective on July 1, 1980, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Amendment Effective July 1, 1980. — Session Laws 1979, c. 760, s. 5, effective July 1, 1980, will amend this section to read as follows:

"**§ 20-182. Penalty for failure to stop in event of accident involving injury or death to a person.** — Every person convicted of willfully

violating G.S. 20-166, relative to the duties to stop or render aid or give the information required in the event of accidents, except as otherwise provided, involving injury or death to a person, shall be punished as a Class I felony. The Commissioner shall revoke the operator's or chauffeur's license of the person so convicted. In no case shall the court have power to suspend judgment upon payment of costs."

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 35, effective Jan. 1, 1981, will amend this section to read as follows:

"**§ 20-182. Penalty for failure to stop in event of accident involving injury or death to a person.** — Every person convicted of willfully violating G.S. 20-166, relative to the duties to stop or render aid or give the information required in the event of accidents, except as otherwise provided, involving injury or death to a person, shall be punished as a Class I felony. The Commissioner shall revoke the driver's license of the person so convicted. In no case shall the court have power to suspend judgment upon payment of costs."

§ 20-183. Duties and powers of law-enforcement officers; warning by local officers before stopping another vehicle on highway; warning tickets.

Editor's Note. —

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

Unrestrained Discretion to Stop Vehicle Violates Standards of Terry v. Ohio. — To permit vehicle stops in the unrestrained discretion of police officers is to allow such stops to be used as pretexts for investigations and to sanction stops which could not have been justified under the standards set out in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

State Power Must Accommodate Individual Interest.—The State has the power to enforce its vehicle safety and registration laws through some system of vehicle stops, but the Fourth Amendment also requires some accommodation of the individual interest in being left alone. Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

Vehicle license checks must not be used as pretexts for harassment or for baseless investigations. Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

Policeman's Stopping Individual Private Driveway Constituted Fourth Amendment "Seizure". — Where a patrolman, while not engaged in any patrol of the highway for purposes of observing traffic or making random license checks, spontaneously decided to stop petitioner, not while petitioner was "on a public highway" nor while petitioner was operating a vehicle, but instead while petitioner was in a private driveway, it would have been perfectly natural for the petitioner to assume that he was about to be subjected to a search or inquiry for some purpose other than a routine license check and that the officer meant to accost him for some purpose. There is no doubt that the officer's stop and demand was a "seizure" within the meaning of the Fourth Amendment. Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

Power to Stop Vehicle Does Not Include Power to Search. — The power to stop a vehicle under this section does not include the power to search. The power to search incident to a warrantless arrest is clearly limited to situations where the officer, after stopping the vehicle, has found a person "violating the provisions of this Article." State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

State's Interests Do Not Justify Unreasonable Interference with Individual's Rights. — The decision in State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973), is not sufficiently sensitive to the need to accommodate the State's interest in enforcing its vehicle laws to the individual's right to be free from unreasonable interference with his travel on the highways. Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

Illustration of Danger of Blanket Approval for Vehicle Stops. — Where a patrolman, while not engaged in any patrol of the highway for the purposes of observing traffic or making random license checks, spontaneously decided to stop petitioner, not while petitioner was "on a public highway" nor while petitioner was operating a vehicle, but instead while petitioner was in a private driveway, the patrolman's actions illustrate the danger inherent in blanket approval of all vehicle stops where the nominal purpose is to check registration or licenses. Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 978).

The power to stop a vehicle under this section is not dependent on probable cause to believe a violation has occurred. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Stopping Vehicle to Determine If Driver Possessed Contraband Drugs. — Where there was no evidence that the officer stopped the vehicle operated by the defendant for the purpose of determining if he had violated a motor vehicle statute, but rather, the obvious purpose in stopping the vehicle was to determine if the defendant possessed contraband drugs, the officer had no right to remove the defendant from and search the vehicle. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Defendant Not Entitled to Resist Arguably Lawful Arrest. — Where a patrolman, while not engaged in any patrol of the highway for purposes of observing traffic or making random license checks, spontaneously decided to stop petitioner, not while petitioner was "on a public highway" nor while petitioner was operating a vehicle, but instead while petitioner was in a private driveway, although petitioner would have had a meritorious defense to any prosecution based on failure to display his license, he was not entitled to invoke self-help against what was, at the time, an arguably lawful arrest, and petitoner's conviction for assaulting the highway patrolman can survive despite the finding that the officer's initial stop and demand were illegal as an unreasonable search and seizure under the Fourth Amendment. Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

Cited in State v. Bridges, 35 N.C. App. 81, 239 S.E.2d 856 (1978).

ARTICLE 3A.

Motor Vehicle Law of 1947.

Part 2. Equipment Inspection of Motor Vehicles.

§ 20-183.2. Equipment inspection required; inspection certificate; one-way permit to move vehicle to inspection station.

(b) Every inspection certificate issued under this Part shall be valid for not less than 12 months and shall expire at midnight on the last day of the month designated on said inspection certificate. It shall be unlawful to operate any motor vehicle on the highway until there is displayed thereon a current inspection certificate as provided by this Part, indicating that the vehicle has been inspected within the previous 12 months and has been found to comply with the standard for safety equipment prescribed by this Chapter subject to the following provisions:

(1) Vehicles of a type required to be inspected under subsection (a), which are owned by a resident of this State, that have been outside of North Carolina continuously for a period of 30 days, or more, immediately preceding the expiration of the then current inspection certificate shall within 10 days of reentry to the State be inspected and have an approved certificate attached thereto if vehicle is to continue operation on the streets and highways.

(2) Any vehicle owned or possessed by a dealer, manufacturer or transporter within this State and operated over the public streets and highways displaying thereon a dealer demonstration, manufacturer or transporter plate must have affixed to the windshield thereof a valid certificate of inspection and approval, except a dealer, manufacturer or transporter or his agent may operate a motor vehicle displaying dealer demonstration, manufacturer or transporter plates from source of purchase to his place of business or to an inspection station, provided it is within 10 days of purchase, foreclosure or repossession. Provided further, that a new car dealer may operate a new motor vehicle prior to first sale for customer demonstration purposes only without affixing thereto an inspection certificate as required by this section if such dealer causes an inspection of the equipment enumerated in G.S. 20-183.3 to be made and affixes on the window of the vehicle adjacent to the manufacturer's price list a certificate as near as practical in form and content as follows:

Dealer . . . . . .
Dealer license number . . . . . .

Vehicle make . . . . . Year model . . . . . .
Vehicle identification number . . . . . .

Equipment Item	*Check square when inspected and approved*
Brakes	☐
Lights	☐
Horn	☐
Steering Mechanism	☐
Windshield Wiper	☐
Directional Signals	☐
Tires	☐
Rear View Mirror	☐
Exhaust System	☐

I certify that the above items of equipment have been inspected and found to be in good working order.

. . . . . .
Dealer or Agent

(3) Vehicles acquired by residents of this State from dealers or owners located outside of the State must, upon entry to this State, be inspected and approved, certificate attached, within 10 days after the vehicle becomes subject to registration.

(4) Vehicles acquired by residents within this State, not displaying current North Carolina inspection certificates, must be inspected and have approved inspection certificate attached within 10 days from date registration plate issued or if registration plate is to be transferred, within 10 days of the date of purchase.

(5) Owners of motor vehicles moving their residence to North Carolina from other states must within 10 days from the date the vehicles are subject to registration have same inspected and have an approved certificate attached thereto.

(6) The Commissioner of Motor Vehicles or his duly authorized agent is empowered to grant special written one-way permits to operate motor vehicles without current inspection certificates solely for the purpose of moving such vehicles to an authorized inspection station to obtain the inspection required under this Part.

(7) Vehicles which are base plated in North Carolina under the International Registration Plan but which are stationed in another jurisdiction shall be permitted to operate in North Carolina on their initial trip into North Carolina without displaying a valid inspection certificate.

(1979, c. 77.)

Editor's Note. — The 1979 amendment added subdivision (7) to subsection (b). As the other subsections were not changed by the amendment, they are not set out.

§ 20-183.7. Charges for inspections and certificates; safety equipment inspection station records. — (a) Every safety equipment inspection station shall charge a fee of three dollars and sixty-five cents ($3.65) for inspecting a motor vehicle to determine compliance with the inspection requirements of this Article and shall give the vehicle operator a dated receipt, indicating the articles and equipment approved and disapproved. At any time within 90 days thereafter, when the receipt is presented to the inspection station which issued it with a request for reinspection, that inspection station shall reinspect the vehicle at no charge. When said vehicle is approved, the inspection station shall obtain a fee of thirty-five cents (35¢) for a valid inspection certificate, and affix the certificate to that vehicle.

(b) Self-inspector stations licensed under G.S. 20-183.4 are exempt from the inspecting fee provisions of subsection (a) above, but shall pay to the Division of Motor Vehicles the prescribed certificate fee for each inspection certificate issued by it.

(c) All fees collected for inspection certificates shall be paid to the Division of Motor Vehicles, in accordance with its regulations, and these fees shall be placed in the Highway Fund.

(d) Each inspection station shall maintain a record of inspections performed, in a form approved by the Division of Motor Vehicles, for a period of 18 months and such records shall be made available for inspection by any law-enforcement officer, upon demand, during normal business hours. (1965, c. 734, s. 1; 1969, c. 1242; 1973, c. 1480; 1975, c. 547; c. 716, s. 5; c. 875, s. 4; 1979, c. 688.)

Editor's Note. —
The 1979 amendment rewrote the former section, redesignated it as subsection (a), and added subsections (b), (c), and (d). As enacted this amendment was to become effective July 1, 1979, but Session Laws 1979, c. 814 changed the effective date to Jan. 1, 1980.

ARTICLE 3B.

Permanent Weighing Stations and Portable Scales.

§ 20-183.9. Establishment and maintenance of permanent weighing stations. — The Department of Transportation is hereby authorized, empowered and directed to establish during the biennium ending June 30, 1953, not less than six nor more than 13 permanent weighing stations equipped to weigh vehicles using the streets and highways of this State to determine whether such vehicles are being operated in accordance with legislative enactments relating to weights of vehicles and their loads. The permanent weighing stations shall be established at such locations on the streets and highways in this State as will enable them to be used most advantageously in determining the weight of vehicles and their loads. Said permanent weighing stations shall be equipped by the Department of Transportation and shall be maintained by said Department of Transportation. (1951, c. 988, s. 1; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, ss. 34, 37; 1979, c. 76.)

Editor's Note. —
The 1979 amendment substituted "13" for "12" near the middle of the first sentence.

ARTICLE 4.

State Highway Patrol.

§ 20-185. Personnel; appointment; salaries.

(c) The provisions of subsection (b) of this section shall be in lieu of all compensation provided for the first two years of such incapacity by G.S. 97-29 and 97-30, but shall be in addition to any other benefits or compensation to which such officer or member of the State Highway Patrol shall be entitled under the provisions of the Workers' Compensation Act. The provisions of G.S. 97-24 will commence at the end of the two-year period salary is paid under subsection (b) of this section to any officer or member of the State Highway Patrol.

(e) Any officer or member of the State Highway Patrol, who as a result of an injury by accident arising out of and in the course of the performance by him of his official duties, shall be totally or partially incapacitated to perform any duties to which he may be lawfully assigned, shall report such incapacity to the commanding officer of the State Highway Patrol as soon as may be practicable in such manner as the commanding officer of the State Highway Patrol shall require. Upon the filing of such report, the commanding officer of the State Highway Patrol shall determine the cause of such incapacity, and to what extent the claimant may be assigned to other than his normal duties. The finding of the commanding officer of the State Highway Patrol shall determine the right of the claimant to benefits under subsection (b) of this section, unless the claimant, within 30 days after he receives notice thereof, files with the North Carolina Industrial Commission, upon such form as it shall require, a request for a hearing. Upon the filing of such request, the North Carolina Industrial Commission shall proceed to hear the matter in accordance with its regularly established procedure for hearing claims filed under the Workers' Compensation Act, and shall report its findings to the commanding officer of the State Highway Patrol. From the decision of the North Carolina Industrial Commission an appeal shall lie as in other matters heard and determined by such Commission. Any officer or member of the State Highway Patrol who shall refuse to perform any duties to which he may properly be assigned as the result of the finding of the commanding officer of the State Highway Patrol, or of the North Carolina Industrial Commission, shall be entitled to no benefits pursuant to subsection (b) of this section so long as such refusal shall continue.

(1979, c. 714, s. 2.)

Editor's Note. — The 1979 amendment, effective July 1, 1979, substituted "Workers' " for "Workmen's" near the end of the first sentence in subsection (c) and near the middle of the fourth sentence in subsection (e). As the rest of the section was not changed by the amendment, only subsections (c) and (e) are set out.

§ 20-187.2. Badges and service side arms of deceased or retiring members of State, city and county law-enforcement agencies; revolvers of active members. — (a) Surviving spouses, or in the event such members die unsurvived by a spouse, surviving children of members of North Carolina State, city and county law-enforcement agencies killed in the line of duty or who are members of such agencies at the time of their deaths, and retiring members of such agencies shall receive upon request and at no cost to them, the badge worn or carried by such deceased or retiring member. The governing body of a law-enforcement agency may, in its discretion, also award to a retiring member or surviving relatives as provided herein, upon request, the service side arm of such deceased or retiring members, at a price determined by such governing body, upon securing a permit as required by G.S. 14-402 et seq. or 14-409.1 et seq., or without such permit provided the revolver shall have been rendered incapable of being fired. Governing body shall mean for county and local alcohol beverage control officers, the county or local board of alcoholic control; for all other law-enforcement officers with jurisdiction limited to a municipality or town, the city or town council; for all other law-enforcement officers with countywide jurisdiction, the board of county commissioners; for all State law-enforcement officers, the head of the department.

(b) Active members of North Carolina State law-enforcement agencies, upon change of type of revolvers, may purchase the revolver worn or carried by such member at a price which shall be the average yield to the State from the sale of similar revolvers during the preceding year. (1971, c. 669; 1973, c. 1424; 1975, c. 44; 1977, c. 548; 1979, c. 882.)

Editor's Note. —
The 1979 amendment, effective July 1, 1979, divided the former first sentence into the present first and second sentences. The amendment deleted "and service revolver" following "the badge" near the end of the present first sentence, added "The governing body of a law-enforcement agency may, in its discretion, also award to a retiring member or surviving relatives as provided herein, upon request, the service side arm of such deceased or retiring members, at a price determined by such governing body," at the beginning of the present second sentence, and added the third sentence.

§ 20-190. Uniforms; motor vehicles and arms; expense incurred; color of vehicle. — The Department of Crime Control and Public Safety shall adopt some distinguishing uniform for the members of said State Highway Patrol, and furnish each member of the Patrol with an adequate number of said uniforms and each member of said Patrol force when on duty shall be dressed in said uniform. The Department of Crime Control and Public Safety shall likewise furnish each member of the Patrol with a suitable motor vehicle, and necessary arms, and provide for all reasonable expense incurred by said Patrol while on duty, provided, that not less than eighty-three percent (83%) of the number of motor vehicles operated on the highways of the State by members of the State Highway Patrol shall be painted a uniform color of black and silver. (1929, c. 218, s. 5; 1941, c. 36; 1955, c. 1132, ss. 1, 1¼, 1¾; 1957, c. 478, s. 1; c. 673, s. 1; 1961, c. 342; 1975, c. 716, s. 5; 1977, c. 70, s. 15; 1979, c. 229.)

Editor's Note. —
The 1979 amendment, effective Jan. 1, 1980, substituted "eighty-three percent (83%)" for "seventy-nine percent (79%)" near the end of the second sentence.

ARTICLE 7.

Miscellaneous Provisions Relating to Motor Vehicles.

§ 20-217. Motor vehicles to stop for properly marked and designated school buses in certain instances. — The driver of any vehicle upon approaching from any direction on the same street or highway any school bus (including privately owned buses transporting children and school buses transporting elderly persons under G.S. 115-183.1), while such bus is displaying its mechanical stop signal, or is stopped for the purpose of receiving or discharging passengers, shall bring his vehicle to a full stop before passing or attempting to pass such bus, and shall remain stopped until the mechanical stop signal has been withdrawn or until the bus has moved on. The driver of a vehicle upon any interstate or other controlled-access highway need not stop upon meeting or passing a school bus which is in the roadway across the dividing space or physical barrier separating the roadways.

The provisions of this section are applicable only in the event the school bus bears upon the front and rear a plainly visible sign containing the words "school bus" in letters not less than eight inches in height.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed two hundred dollars ($200.00) or imprisoned not to exceed 90 days. (1925, c. 265; 1943, c. 767; 1947, c. 527; 1955, c. 1365; 1959, c. 909; 1965, c. 370; 1969, c. 952; 1971, c. 245, s. 1; 1973, c. 1330, s. 35; 1977, 2nd Sess., c. 1280, s. 4.)

Editor's Note. — The 1977, 2nd Sess., amendment added "and school buses transporting elderly persons under G.S. 115-183.1" in the parenthetical phrase in the first sentence of the first paragraph.

§ 20-218. Standard qualifications for school bus drivers; speed limit. — (a) No person shall drive or operate a school bus over the public roads of North Carolina while the same is occupied by children unless said person shall be fully trained in the operation of motor vehicles, and shall furnish to the superintendent of the schools of the county in which said bus shall be operated a certificate from any representative duly designated by the Commissioner of Motor Vehicles, and the chief mechanic in charge of school buses in said county showing that he has been examined by a representative duly designated by the Commissioner of Motor Vehicles, and said chief mechanic in charge of school buses in said county and that he is a fit and competent person to operate or drive a school bus over the public roads of the State. Notwithstanding the above, school activity buses may be operated by a person who holds a school bus driver's certificate or a chauffeur's license.

(1979, c. 31, ss. 1, 2.)

Editor's Note. —

The 1979 amendment, effective Oct. 1, 1979, deleted "from the Highway Patrol of North Carolina, or" after "a certificate" and "a member of the said Highway Patrol or" after "examined by" near the middle of the first sentence of subsection (a).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

As subsections (b) and (c) were not changed by the amendment, they are not set out.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 36, will add to subsection (a) a new sentence reading as follows: "Notwithstanding the provisions of G.S. 20-7(a)(3), the driver of a school bus must be at least 16 years of age and hold a driver's license of Class 'A,' 'B,' or 'C' and a school bus driver's certificate, and the driver of a school activity bus must hold a driver's license of Class 'C' and a school bus driver's certificate or a driver's license of Class 'A' or Class 'B'."

This section as rewritten by Session Laws 1977, c. 791, contains the correct version of the statute. Opinion of Attorney General to Major D.R. Emory, N.C. State Highway Patrol, 47 N.C.A.G. 75 (1977).

§ 20-219.2. Removal of unauthorized vehicles from private lots.

(c) This section shall apply only to the Counties of Craven, Forsyth, Gaston, Guilford, New Hanover, Orange, Robeson, Wake, Wilson and to the Cities of Durham and Charlotte. (1969, cc. 173, 288; 1971, c. 986; 1973, c. 183; c. 981, s. 1; c. 1330, s. 36; 1975, c. 575; 1979, c. 380.)

Editor's Note. —

The 1979 amendment substituted "Cities of Durham and Charlotte" for "City of Durham" at the end of subsection (c).

As subsections (a) and (b) were not changed by the amendment, they are not set out.

ARTICLE 9A.

Motor Vehicle Safety and Financial Responsibility Act of 1953.

§ 20-279.1. Definitions. — The following words and phrases, when used in this Article, shall, for the purposes of this Article, have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning:

(11) "Proof of financial responsibility": Proof of ability to respond in damages for liability, on account of accidents occurring subsequent to the effective date of said proof, arising out of the ownership, maintenance or use of a motor vehicle, in the amount of twenty-five

thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident, and, subject to said limit for one person, in the amount of fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident, and in the amount of ten thousand dollars ($10,000) because of injury to or destruction of property of others in any one accident. Nothing contained herein shall prevent an insurer and an insured from entering into a contract, not affecting third parties, providing for a deductible as to property damage at a rate approved by the Commissioner of Insurance.

(1979, c. 832, s. 1.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1980, substituted "twenty-five thousand dollars ($25,000)" for "fifteen thousand dollars ($15,000)," "fifty thousand dollars ($50,000)" for "thirty thousand dollars ($30,000)," "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)" in the first sentence of subdivision (11).

Session Laws 1979, c. 832, s. 12, provides: "This act will not affect any policy in effect on the effective date of this act [Jan. 1, 1980] nor will this act affect pending litigation."

Section 13 makes this act effective January 1, 1980.

As the other subdivisions were not changed by the amendment, only the introductory paragraph and subdivision (11) are set out.

For comment, "Compulsory Motor Vehicle Liability Insurance: Joinder of Insurers as Defendants in Actions Arising out of Automobile Accidents," see 14 Wake Forest L. Rev. 200 (1978).

§ 20-279.5. Security required unless evidence of insurance; when security determined; suspension; exceptions.

(c) This section shall not apply under the conditions stated in G.S. 20-279.6 nor:

(1) To such operator or owner if such owner had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident;

(2) To such operator, if not the owner of such motor vehicle, if there was in effect at the time of such accident a motor vehicle liability policy or bond with respect to his operation of motor vehicles not owned by him;

(3) To such operator or owner if the liability of such operator or owner for damages resulting from such accident is, in the judgment of the Commissioner, covered by any other form of liability insurance policy or bond or sinking fund or group assumption of liability;

(4) To any person qualifying as a self-insurer, nor to any operator for a self-insurer if, in the opinion of the Commissioner from the information furnished him, the operator at the time of the accident was probably operating the vehicle in the course of the operator's employment as an employee or officer of the self-insurer; nor

(5) To any employee of the United States government while operating a vehicle in its service and while acting within the scope of his employment, such operations being fully protected by the Federal Tort Claims Act of 1946, which affords ample security to all persons sustaining personal injuries or property damage through the negligence of such federal employee.

No such policy or bond shall be effective under this section unless issued by an insurance company or surety company authorized to do business in this State, except that if such motor vehicle was not registered in this State, or was a motor vehicle which was registered elsewhere than in this State at the effective date of the policy or bond, or the most recent renewal thereof, or if such operator not an owner was a nonresident of this State, such policy or bond shall not be effective under this section unless the insurance company or surety company if

not authorized to do business in this State shall execute a power of attorney authorizing the Commissioner to accept service on its behalf of notice or process in any action upon such policy, or bond arising out of such accident, and unless said insurance company or surety company, if not authorized to do business in this State, is authorized to do business in the state or other jurisdiction where the motor vehicle is registered or, if such policy or bond is filed on behalf of an operator not an owner who was a nonresident of this State, unless said insurance company or surety company, if not authorized to do business in this State, is authorized to do business in the state or other jurisdiction of residence of such operator; provided, however, every such policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and cost, of not less than twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, to a limit of not less than fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident, and, if the accident has resulted in injury to or destruction of property, to a limit of not less than ten thousand dollars ($10,000) because of injury to or destruction of property of others in any one accident. (1953, c. 1300, s. 5; 1955, cc. 138, 854; c. 855, s. 1; c. 1152, ss. 4-8; c. 1355; 1967, c. 277, s. 2; 1971, c. 763, s. 3; 1973, c. 745, s. 2; 1979, c. 832, s. 2.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1980, substituted "twenty-five thousand dollars ($25,000)" for "fifteen thousand dollars ($15,000)," "fifty thousand dollars ($50,000)" for "thirty thousand dollars ($30,000)," and "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)" near the end of the last unnumbered paragraph of subsection (b).

Session Laws 1979, c. 832, s. 12, provides: "This act will not affect any policy in effect on the effective date of this act [Jan. 1, 1980] nor will this act affect pending litigation."

Section 13 makes this act effective January 1, 1980.

As subsection (a) was not changed by the amendment, it is not set out.

§ 20-279.13. Suspension for nonpayment of judgment; exceptions.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 37, effective Jan. 1, 1981, will amend subsection (b) to read as follows:

"(b) The Commissioner shall not, however, revoke or suspend the license of an owner or driver if the insurance carried by him was in a company which was authorized to transact business in this State and which subsequent to an accident involving the owner or operator and prior to settlement of the claim therefor went into liquidation, so that the owner or driver is thereby unable to satisfy the judgment arising out of the accident."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-279.15. Payment sufficient to satisfy requirements. — In addition to other methods of satisfaction provided by law, judgments herein referred to shall, for the purpose of this Article, be deemed satisfied:

(1) When twenty-five thousand dollars ($25,000) has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of one person as the result of any one accident; or

(2) When, subject to such limit of twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person, the sum of fifty thousand dollars ($50,000) has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of two or more persons as the result of any one accident; or

(3) When ten thousand dollars ($10,000) has been credited upon any judgment or judgments rendered in excess of that amount because of injury to or destruction of property of others as a result of any one accident;

Provided, however, payments made in settlement of any claims because of bodily injury, death or property damage arising from a motor vehicle accident shall be credited in reduction of the amounts provided for in this section. (1953, c. 1300, s. 15; 1963, c. 1238; 1967, c. 277, s. 3; 1973, c. 745, s. 3; c. 889; 1979, c. 832, ss. 3-5.)

Editor's Note. — The 1979 amendment, effective Jan. 1, 1980, substituted "twenty-five thousand dollars ($25,000)" for "fifteen thousand dollars ($15,000)" near the beginning of subdivision (1), substituted "twenty-five thousand dollars ($25,000)" for "fifteen thousand dollars ($15,000)" near the beginning of subdivision (2), and substituted "fifty thousand dollars ($50,000)" for "thirty thousand dollars ($30,000)" and "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)" near the beginning of subdivision (3).

Session Laws 1979, c. 832, s. 12, provides: "This act will not affect any policy in effect on the effective date of this act [Jan. 1, 1980] nor will this act affect pending litigation."

Section 13 makes this act effective January 1, 1980.

Coverage Extends to Property Damage as Well as Personal Injuries. — Under subdivision (3) of this section, coverage within this Article extends to property damage as well as to personal damages occurring to the victim of an accident. Nationwide Mut. Ins. Co. v. Knight, 34 N.C. App. 96, 237 S.E.2d 341, cert. denied, 293 N.C. 589, 239 S.E.2d 263 (1977).

Property Damage from Intentional Ramming of Defendant's Car. — An automobile insurer was required to compensate defendant for any property damage arising out of the intentional ramming of defendant's automobile by the insured. Nationwide Mut. Ins. Co. v. Knight, 34 N.C. App. 96, 237 S.E.2d 341, cert. denied, 293 N.C. 589, 239 S.E.2d 263 (1977).

§ 20-279.21. "Motor vehicle liability policy" defined.

(b) Such owner's policy of liability insurance:

(1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted;

(2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident, and ten thousand dollars ($10,000) because of injury to or destruction of property of others in any one accident; and

(3) No policy of bodily injury liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in subsection (c) of G.S. 20-279.5, under provisions filed with and approved by the Commissioner of Insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury,

sickness or disease, including death, resulting therefrom; and provided that an insured shall be entitled to secure increased limits coverage of twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident if the policy of such insured carries liability limits of equal or greater amounts for the protection of third persons. Such provisions shall include coverage for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of injury to or destruction of the property of such insured, with a limit in the aggregate for all insureds in any one accident of ten thousand dollars ($10,000) and subject, for each insured, to an exclusion of the first one hundred dollars ($100.00) of such damages. Such provision shall further provide that a written statement by the liability insurer, whose name appears on the certification of financial responsibility made by the owner of any vehicle involved in an accident with the insured, that such other motor vehicle was not covered by insurance at the time of the accident with the insured shall operate as a prima facie presumption that the operator of such other motor vehicle was uninsured at the time of the accident with the insured for the purposes of recovery under this provision of the insured's liability insurance policy. The coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage.

In addition to the above requirements relating to uninsured motorist insurance, every policy of bodily injury liability insurance covering liability arising out of the ownership, maintenance or use of any motor vehicle, which policy is delivered or issued for delivery in this State, shall be subject to the following provisions which need not be contained therein.

a. A provision that the insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law; provided however, that the determination of whether a motorist is uninsured may be decided only by an action against the insurer alone. The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name. The insurer, upon being served with copy of summons, complaint or other pleading, shall have the time allowed by statute in which to answer, demur or otherwise plead (whether such pleading is verified or not) to the summons, complaint or other process served upon it. The consent of the insurer shall not be required for the initiation of suit by the insured against the uninsured motorist: Provided, however, no action shall be initiated by the insured until 60 days following the posting of notice to the insurer at the address shown on the policy or after personal delivery of such notice to the insurer or its agent setting forth the belief of the insured that the prospective defendant or defendants are uninsured motorists. No default judgment shall be entered when the insurer has timely filed an answer or other pleading as required by law.

b. Where the insured, under the uninsured motorist coverage, claims that he has sustained bodily injury as the result of collision between motor vehicles and asserts that the identity of the operator or owner of a vehicle (other than a vehicle in which the insured is a passenger) cannot be ascertained, the insured may institute an action directly against the insurer: Provided, in such event, the insured, or someone in his behalf, shall report the accident within 24 hours or as soon thereafter as may be practicable, to a police officer, peace officer, other judicial officer, or to the Commissioner of Motor Vehicles. The insured shall also within a reasonable time give notice to the insurer of his injury, the extent thereof, and shall set forth in such notice the time, date and place of such injury. Thereafter, on forms to be mailed by the insurer within 15 days following receipt of the notice of the accident to the insurer, the insured shall furnish to insurer such further reasonable information concerning the accident and the injury as the insurer shall request. If such forms are not so furnished within 15 days, the insured shall be deemed to have complied with the requirements for furnishing information to the insurer. Suit may not be instituted against the insurer in less than 60 days from the posting of the first notice of such injury or accident to the insurer at the address shown on the policy or after personal delivery of such notice to the insurer or its agent.

Provided under this section the term "uninsured motor vehicle" shall include, but not be limited to, an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability within the limits specified therein because of insolvency.

An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tort-feasor becomes insolvent within three years after such an accident. Nothing herein shall be construed to prevent any insurer from affording insolvency protection under terms and conditions more favorable to the insured than is provided herein.

In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement for judgment resulting from the exercise of any limits of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer.

For the purpose of this section, an "uninsured motor vehicle" shall be a motor vehicle as to which there is no bodily injury liability insurance and property damage liability insurance in at least the amounts specified in subsection (c) of G.S. 20-279.5, or there is such insurance but the insurance company writing the same denies coverage thereunder, or has become bankrupt, or there is no bond or deposit of money or securities as provided in G.S. 20-279.24 or 20-279.25 in lieu of such bodily injury and property damage liability insurance, or the owner of such motor vehicle has not qualified as a self-insurer under the provisions of G.S. 20-279.33, or a vehicle that is not subject to the provisions of the Motor Vehicle Safety and Financial Responsibility Act; but the term "uninsured motor vehicle" shall not include:

a. A motor vehicle owned by the named insured;

b. A motor vehicle which is owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law;

c. A motor vehicle which is owned by the United States of America, Canada, a state, or any agency of any of the foregoing (excluding, however, political subdivisions thereof);

d. A land motor vehicle or trailer, if operated on rails or crawler-treads or while located for use as a residence or premises and not as a vehicle; or

e. A farm-type tractor or equipment designed for use principally off public roads, except while actually upon public roads.

For purposes of this section "persons insured" means the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of such motor vehicle.

(4) In addition to the coverages set forth in subdivisions (1) through (3) of this subsection, at the written request of the insured, shall provide for underinsured motorist insurance coverage to be used with policies affording uninsured motorist at limits in excess of the limits prescribed by the applicable financial responsibility law pursuant to this section, as required or permitted by the applicable uninsured motorist insurance law, but not exceeding the policy limits for automobile bodily injury liability as specified in the owner's policy. An "uninsured motor vehicle," as described in subdivision (3) of this subsection, shall include an "underinsured highway vehicle" which means a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of liability under this insurance coverage. For the purposes of this subdivision, the term "highway vehicle" means a land motor vehicle or trailer other than (i) a farm-type tractor or other vehicle designed for use principally off public roads and while not upon public roads, (ii) a vehicle operated on rails or crawler-treads, or (iii) a vehicle while located for use as a residence or premises. The insurer shall not be obligated to make any payment because of bodily injury to which this insurance applies and which arises out of the ownership, maintenance, or use of an underinsured highway vehicle until after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident have been exhausted by payment of judgments or settlements.

(f) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

(1) Except as hereinafter provided, the liability of the insurance carrier with respect to the insurance required by this Article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be canceled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy. As to policies issued to insureds in this State under the assigned risk plan or through the North Carolina Motor Vehicle Reinsurance Facility, a default judgment taken against such an insured shall not be used as a basis for obtaining judgment against the insurer unless counsel for the plaintiff has forwarded to the insurer, or to one of its agents, by registered or certified mail with return receipt requested, or served by any other method of service provided by law,

a copy of summons, complaint, or other pleadings, filed in the action. The return receipt shall, upon its return to plaintiff's counsel, be filed with the clerk of court wherein the action is pending against the insured and shall be admissible in evidence as proof of notice to the insurer. The refusal of insurer or its agent to accept delivery of the registered mail, as provided in this section, shall not affect the validity of such notice and any insurer or agent of an insurer refusing to accept such registered mail shall be charged with the knowledge of the contents of such notice. When notice has been sent to an agent of the insurer such notice shall be notice to the insurer. The word "agent" as used in this subsection shall include, but shall not be limited to, any person designated by the insurer as its agent for the service of process, any person duly licensed by the insurer in the State as insurance agent, any general agent of the company in the State of North Carolina, and any employee of the company in a managerial or other responsible position, or the North Carolina Commissioner of Insurance; provided, where the return receipt is signed by an employee of the insurer or an employee of an agent for the insurer, shall be deemed for the purposes of this subsection to have been received. The term "agent" as used in this subsection shall not include a producer of record or broker, who forwards an application for insurance to the North Carolina Motor Vehicle Reinsurance Facility.

The insurer, upon receipt of summons, complaint or other process, shall be entitled, upon its motion, to intervene in the suit against its insured as a party defendant and to defend the same in the name of its insured. In the event of such intervention by an insurer it shall become a named party defendant. The insurer shall have 30 days from the signing of the return receipt acknowledging receipt of the summons, complaint or other pleading in which to file a motion to intervene, along with any responsive pleading, whether verified or not, which it may deem necessary to protect its interest: Provided, the court having jurisdiction over the matter may, upon motion duly made, extend the time for the filing of responsive pleading or continue the trial of the matter for the purpose of affording the insurer a reasonable time in which to file responsive pleading or defend the action. If, after receiving copy of the summons, complaint or other pleading, the insurer elects not to defend the action, if coverage is in fact provided by the policy, the insurer shall be bound to the extent of its policy limits to the judgment taken by default against the insured, and noncooperation of the insured shall not be a defense.

If the plaintiff initiating an action against the insured has complied with the provisions of this subsection, then, in such event, the insurer may not cancel or annul the policy as to such liability and the defense of noncooperation shall not be available to the insurer: Provided, however, nothing in this section shall be construed as depriving an insurer of its defenses that the policy was not in force at the time in question, that the operator was not an "insured" under policy provisions, or that the policy had been lawfully canceled at the time of the accident giving rise to the cause of action.

Provided further that the provisions of this subdivision shall not apply when the insured has delivered a copy of the summons, complaint or other pleadings served on him to his insurance carrier within the time provided by law for filing answer, demurrer or other pleadings.

(2) The satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damage;

(3) The insurance carrier shall have the right to settle any claim covered by the policy, and if such settlement is made in good faith, the amount

thereof shall be deductible from the limits of liability specified in subdivision (2) of subsection (b) of this section;

(4) The policy, the written application therefor, if any, and any rider or endorsement which does not conflict with the provisions of the Article shall constitute the entire contract between the parties.

(1979, c. 190; c. 675; c. 832, ss. 6, 7.)

Editor's Note. —

The first 1979 amendment substituted "North Carolina Motor Vehicle Reinsurance Facility" for "assigned risk bureau" at the end of the last sentence of the first paragraph of subdivision (1) of subsection (f), and deleted the former last two sentences of that paragraph, which read: "The Commissioner of Motor Vehicles and the North Carolina assigned risk bureau shall, upon request made, furnish to the plaintiff or his counsel the identity and address of the insurance carrier as shown upon the records of the Division or the bureau, and whether the policy is an assigned risk policy. Neither the Division of Motor Vehicles nor the assigned risk bureau shall be subject to suit by reason of a mistake made as to the identity of the carrier and its address in response to a request made for such information."

The second 1979 amendment, effective Oct. 1, 1979, added subdivision (4) to subsection (b).

The third 1979 amendment, effective Jan. 1, 1980, substituted "twenty-five thousand dollars ($25,000)" for "fifteen thousand dollars ($15,000)," "fifty thousand dollars ($50,000)" for "thirty thousand dollars ($30,000)," and "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)" near the end of subdivision (2) of subsection (b). In subdivision (3) of subsection (b) the amendment substituted "twenty-five thousand dollars ($25,000)" for "fifteen thousand dollars ($15,000)" and "fifty thousand dollars ($50,000)" for "thirty thousand dollars ($30,000)" near the end of the first sentence, and "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)" near the middle of the second sentence.

Session Laws 1979, c. 832, s. 12, provides: "This act will not affect any policy in effect on the effective date of this act [Jan. 1, 1980] nor will this act affect pending litigation."

Section 13 makes this act effective January 1, 1980.

As only subsections (b) and (f) were changed by the amendments, the other subsections are not set out.

I. GENERAL CONSIDERATION.

Editor's Note. —

For survey of 1973 case law with regard to the construction of the omnibus clause, see 52 N.C.L. Rev. 809 (1974).

For a survey of 1977 law on insurance, see 56 N.C.L. Rev. 1084 (1978).

The manifest purpose, etc. —

The mandatory coverage required by this Article is solely for the protection of innocent victims who may be injured by financially irresponsible motorists. Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977); Engle v. State Farm Mut. Auto. Ins. Co., 37 N.C. App. 126, 245 S.E.2d 532 (1978).

Medical Payment Coverage. — The mandatory coverage required by this Article does not require the insurer to extend medical payment coverage beyond the terms of the policy to one who receives liability coverage solely by virtue of the Article. Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977).

Statute Applies to All Financially Irresponsible Persons, Including Minors. — The language of the Financial Responsibility Act leaves no doubt that the legislature intended to make all financially irresponsible persons, including minors, subject to its provisions. Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977).

The provisions of this section are written into every policy, etc. —

The provisions of the Financial Responsibility Act are "written" into every automobile liability policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail. Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977); Engle v. State Farm Mut. Auto. Ins. Co., 37 N.C. App. 126, 245 S.E.2d 532 (1978).

Insurer Is Liable for Property Damage Intentionally Inflicted by Insured. — An automobile insurer in this State is liable, within the maximum coverage required by this Article, for property damage caused by an insured who intentionally drives an automobile into plaintiff's property. Nationwide Mut. Ins. Co. v. Knight, 34 N.C. App. 96, 237 S.E.2d 341, cert. denied, 293 N.C. 589, 239 S.E.2d 263 (1977).

An automobile insurer was required to compensate defendant for any property damage arising out of the intentional ramming of defendant's automobile by the insured. Nationwide Mut. Ins. Co. v. Knight, 34 N.C. App. 96, 237 S.E.2d 341, cert. denied, 293 N.C. 589, 239 S.E.2d 263 (1977).

A wound caused by gunshots fired from the insured's moving automobile did not constitute an accident arising out of the ownership, maintenance or use of such automobile.

Nationwide Mut. Ins. Co. v. Knight, 34 N.C. App. 96, 237 S.E.2d 341, cert. denied, 293 N.C. 589, 239 S.E.2d 263 (1977).

There was no causal relationship between the ownership, maintenance and use of the insured's moving vehicle, and the injury sustained by the minor defendant as a result of gunshots fired from that moving vehicle. Nationwide Mut. Ins. Co. v. Knight, 34 N.C. App. 96, 237 S.E.2d 341, cert. denied, 293 N.C. 589, 239 S.E.2d 263 (1977).

Provision Requiring Forwarding of Suit Papers Is Valid. — Policy provisions in an insurance contract requiring prompt forwarding of legal process as a condition precedent to recovery on the policy are valid so long as they do not conflict with this Article. Rose Hill Poultry Corp. v. American Mut. Ins. Co., 34 N.C. App. 224, 237 S.E.2d 564 (1977).

Effect of Failure to Forward Suit Papers. — The insured's failure under the terms of a policy to forward suit papers or otherwise notify the insurer of an action instituted in another state by an injured third party did not defeat or void the insurer's liability under the policy with respect to the third party; however, it did relieve the insurer of its obligations under the policy to afford protection for the insured. The insured was not the innocent victim this Article was designed to protect, and thus the provision requiring forwarding of legal process was not in conflict with the purpose of this Article. Rose Hill Poultry Corp. v. American Mut. Ins. Co., 34 N.C. App. 224, 237 S.E.2d 564 (1977).

Settlement of Claims by Insurer. —

When exercised in good faith, subdivision (f)(3) of this section, authorizing the insurer to negotiate and settle claims, is valid and binding on the insured. Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977).

An insurer may have reimbursement from a stranger to the insurance contract whose negligence caused the injuries and damages for which the insurer had paid as a result of liability imposed by statute. Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977).

Policy Provision for Reimbursement by Insured. — Subsection (h) of this section does not compel reimbursement by the insured, it merely allows the insurer and the insured to enter into such an agreement. Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977).

A policy provision providing for reimbursement by the insured is merely a contractual agreement between the parties to the policy and does not have the effect or force of a statute. Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977).

Applied in Ford Marketing Corp. v. National Grange Mut. Ins. Co., 33 N.C. App. 297, 235 S.E.2d 82 (1977).

II. THE OMNIBUS CLAUSE.

Legislative Intent. — The preamble to chapter 1162 of the 1967 Session Laws, which reinstated the words "or any other persons in lawful possession" in subsection (b)(2) of this section suggests very strongly that the reason for adding the quoted words was to alleviate the necessity of proving that the operator of a vehicle belonging to another had the express or implied permission of the owner to drive (the vehicle) on the very trip and occasion of the collision. Engle v. State Farm Mut. Auto. Ins. Co., 37 N.C. App. 126, 245 S.E.2d 532 (1978).

The terms "permission" and "lawful possession" are not synonymous, and parties seeking recovery under a theory of permission must meet a higher standard than those seeking recovery under a theory of mere lawful possession. Caison v. Nationwide Ins. Co., 36 N.C. App. 173, 243 S.E.2d 429 (1978).

Permission is an element, etc. —

The statement in the paragraph under this catchline in the bound volume was overruled in Packer v. Travelers' Ins. Co., 28 N.C. App. 365, 221 S.E.2d 707 (1976); Caison v. Nationwide Ins. Co., 36 N.C. App. 173, 243 S.E.2d 429 (1978).

Permission Not Essential to "Lawful Possession". — The clear intent of the legislature as expressed in the preamble to the 1967 amendment was that permission, express or implied, is not an essential element of lawful possession. Packer v. Travelers' Ins. Co., 28 N.C. App. 365, 221 S.E.2d 707 (1976), overruling Jernigan v. State Farm Mut. Auto. Ins. Co., 16 N.C. App. 46, 190 S.E.2d 866 (1972).

The clear intent of the legislature was that permission, express or implied, is not an essential element of lawful possession. Caison v. Nationwide Ins. Co., 36 N.C. App. 173, 243 S.E.2d 429 (1978).

Liberal Construction, etc. —

In accord with 4th paragraph in original. See Caison v. Nationwide Ins. Co., 36 N.C. App. 173, 243 S.E.2d 429 (1978).

Who May Grant Permission. —

In accord with 6th paragraph in original. See Engle v. State Farm Mut. Auto. Ins. Co., 37 N.C. App. 126, 245 S.E.2d 532 (1978).

The victim's rights under the act against the insurer are not derived through the insured, as in the case of voluntary insurance. Such rights are statutory and become absolute upon the occurrence of injury or damage inflicted by the named insured, by one driving with his permission, or by one driving while in lawful possession of the named insured's car, regardless of whether or not the nature or circumstances of the injury are covered by the contractual terms of the policy. Engle v. State Farm Mut. Auto. Ins. Co., 37 N.C. App. 126, 245 S.E.2d 532 (1978).

III. UNINSURED MOTORIST COVERAGE.

Purpose, etc. —

The uninsured motorist provision of this section was enacted in order to close "gaps" in the motor vehicle financial responsibility legislation and thus, to provide financial recompense to innocent persons who receive injuries through the wrongful conduct of motorists who are uninsured and financially irresponsible. Autry v. Aetna Life & Cas. Ins. Co., 35 N.C. App. 628, 242 S.E.2d 172 (1978).

The term "uninsured motor vehicle" in subdivision (b)(3) of this section is intended to include motor vehicles which should be insured under this Article but are not, and motor vehicles which, though not subject to compulsory insurance under this Article, are at some time operated on the public highways. Autry v. Aetna Life & Cas. Ins. Co., 35 N.C. App. 628, 242 S.E.2d 172 (1978).

No Coverage of Injury on Private Property by Vehicle Not Subject to Financial Responsibility Law. — The uninsured motorist provision was not intended to provide financial recompense to one injured on private property by a vehicle not subject to the registration and compulsory insurance provisions of the motor vehicle financial responsibility legislation. Autry v. Aetna Life & Cas. Ins. Co., 35 N.C. App. 628, 242 S.E.2d 172 (1978).

"Other Insurance" Clauses Unenforceable Where Insured's Actual Damages Exceed Statutory Minimum. — "Other insurance" clauses in policies providing uninsured motorist coverage may not be enforced if such enforcement results in limiting an insured to recovery of an amount equal only to the coverage compelled by the act, when the actual damages suffered by the insured are greater than that amount. Turner v. Masias, 36 N.C. App. 213, 243 S.E.2d 401 (1978).

But Where Actual Damages Are Less, Such Clauses Are Valid. — While an "other insurance" clause in uninsured motorist coverage would be invalid to prevent the insured from being made whole, the use of such clauses to establish the rights of insurers in cases in which the damages were less than the coverage required by the act is not offensive to either the terms or intent of the act. The fact that two policies of insurance of different types are combined to provide the uninsured motorist coverage required by the act does not contravene its terms and, in fact, is specifically provided for in subsection (j). Turner v. Masias, 36 N.C. App. 213, 243 S.E.2d 401 (1978).

Neither the language of the act nor the public policy served by it is concerned with which insurance company makes the insured whole, so long as the "other insurance" clause is not used to defeat recovery of actual damages by an insured who has not rejected uninsured motorist coverage. Turner v. Masias, 36 N.C. App. 213, 243 S.E.2d 401 (1978).

Insured Is Not Limited, etc. —

In accord with original. See Turner v. Masias, 36 N.C. App. 213, 243 S.E.2d 401 (1978).

§ 20-279.25. Money or securities as proof.

(a) Proof of financial responsibility may be evidenced by the certificate of the State Treasurer that the person named therein has deposited with him sixty thousand dollars ($60,000) in cash, or securities such as may legally be purchased by savings banks or for trust funds of a market value of sixty thousand dollars ($60,000). The State Treasurer shall not accept any such deposit and issue a certificate therefor and the Commissioner shall not accept such certificate unless accompanied by evidence that there are no unsatisfied judgments of any character against the depositor in the county where the depositor resides.

(1979, c. 832, s. 8.)

Editor's Note. — The 1979 amendment, effective Jan. 1, 1980, substituted "sixty thousand dollars ($60,000)" for "forty-five thousand dollars ($45,000)" in two places in the first sentence.

Session Laws 1979, c. 832, s. 12, provides: "This act will not affect any policy in effect on the effective date of this act [Jan. 1, 1980] nor will this act affect pending litigation."

Section 13 makes this act effective January 1, 1980.

As subsection (b) was not changed by the amendment, it is not set out.

§ 20-279.32. Exceptions.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 38, will amend this section to read as follows:

"**§ 20-279.32. Exceptions.** — This Article, except its provisions as to the filing of proof of financial responsibility by a common carrier and its drivers, does not apply to any vehicle operated under a permit or certificate of convenience or necessity issued by the North Carolina Utilities Commission, or by the Interstate Commerce Commission, if public liability and property damage insurance for the protection of the public is required to be carried upon it. This Article does not apply to any motor vehicle owned by the State of North Carolina, nor does it apply to the operator of a vehicle owned by the State of North Carolina who becomes involved in an accident while operating the State-owned vehicle if the Commissioner determines that the vehicle at the time of the accident was probably being operated in the course of the operator's employment as an employee or officer of the State. This Article does not apply to the operator of a vehicle owned by a political subdivision of the State of North Carolina who becomes involved in an accident while operating such vehicle if the Commissioner determines that the vehicle at the time of the accident was probably being operated in the course of the operator's employment as an employee or officer of the subdivision providing that the Commissioner finds that the political subdivision has waived any immunity it has with respect to such accidents and has in force an insurance policy or other method of satisfying claims which may arise out of the accident. This Article does not apply to any motor vehicle owned by the federal government, nor does it apply to the operator of a motor vehicle owned by the federal government who becomes involved in an accident while operating the government-owned vehicle if the Commissioner determines that the vehicle at the time of the accident was probably being operated in the course of the operator's employment as an employee or officer of the federal government."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

ARTICLE 10.

Financial Responsibility of Taxicab Operators.

§ 20-280. Filing proof of financial responsibility with governing board of municipality or county.

(b) As used in this section "proof of financial responsibility" shall mean a certificate of any insurance carrier duly authorized to do business in the State of North Carolina certifying that there is in effect a policy of liability insurance insuring the owner and operator of the taxicab business, his agents and employees while in the performance of their duties against loss from any liability imposed by law for damages including damages for care and loss of services because of bodily injury to or death of any person and injury to or destruction of property caused by accident and arising out of the ownership, use or operation of such taxicab or taxicabs, subject to limits (exclusive of interests and costs) with respect to each such motor vehicle as follows: twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident, and ten thousand dollars ($10,000) because of injury to or destruction of property of others in any one accident.

(c) Every person, firm or corporation who engages in the taxicab business and who is a member of or participates in any trust fund or sinking fund, which said trust fund or sinking fund is for the sole purpose of paying claims, damages or judgments against persons, firms or corporations engaging in the taxicab business and which trust fund or sinking fund is approved by the governing body of any city or municipality with a population of over 50,000, shall be deemed a compliance with the financial responsibility provisions of this section.

Provided, however, that in the case of operators of 15 or more taxicabs, the limits (exclusive of interests and costs), with respect to each such motor vehicle shall be as follows: twenty thousand dollars ($20,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, forty thousand dollars ($40,000) because of bodily injury to or death of two or more persons in any one accident, and ten thousand dollars ($10,000) because of injury to or destruction of property of others in any one accident. (1951, c. 406; 1965, c. 350, s. 1; 1967, c. 277, s. 7; 1973, c. 745, s. 6; 1979, c. 832, ss. 9, 10.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1980, substituted "twenty-five thousand dollars ($25,000)" for "fifteen thousand dollars ($15,000)," "fifty thousand dollars ($50,000)" for "thirty thousand dollars ($30,000)" and "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)" near the end of subsection (b). In the second paragraph of subsection (c) the amendment substituted "twenty thousand dollars ($20,000)" for "ten thousand dollars ($10,000)" and "forty thousand dollars ($40,000)" for "twenty thousand dollars ($20,000)" near the middle of the paragraph, and "ten thousand dollars ($10,000)" for "one thousand dollars ($1,000)" near the end of the paragraph.

Session Laws 1979, c. 832, s. 12, provides: "This act will not affect any policy in effect on the effective date of this act [Jan. 1, 1980] nor will this act affect pending litigation."

Section 13 makes this act effective January 1, 1980.

As subsection (a) was not changed by the amendment, it is not set out.

ARTICLE 11.

Liability Insurance Required of Persons Engaged in Renting Motor Vehicles.

§ 20-281. Liability insurance prerequisite to engaging in business; coverage of policy. — From and after July 1, 1953, it shall be unlawful for any person, firm or corporation to engage in the business of renting or leasing motor vehicles to the public for operation by the rentee or lessee unless such person, firm or corporation has secured insurance for his own liability and that of his rentee or lessee, in such an amount as is hereinafter provided, from an insurance company duly licensed to sell motor vehicle liability insurance in this State. Each such motor vehicle leased or rented must be covered by a policy of liability insurance insuring the owner and rentee or lessee and their agents and employees while in the performance of their duties against loss from any liability imposed by law for damages including damages for care and loss of services because of bodily injury to or death of any person and injury to or destruction of property caused by accident arising out of the operation of such motor vehicle, subject to the following minimum limits: twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident, and fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident, and ten thousand dollars ($10,000) because of injury to or destruction of property of others in any one accident. Provided, however, that nothing in this Article shall prevent such operators from qualifying as self-insurers under terms and conditions to be prepared and prescribed by the Commissioner of Motor Vehicles or by giving bond with personal or corporate surety, as now provided by G.S. 20-279.24, in lieu of securing the insurance policy hereinbefore provided for. (1953, c. 1017, s. 1; 1955, c. 1296; 1965, c. 349, s. 1; 1967, c. 277, s. 8; 1973, c. 745, s. 7; 1979, c. 832, s. 11.)

Editor's Note. — The 1979 amendment, effective Jan. 1, 1980, substituted "twenty-five thousand dollars ($25,000)" for "fifteen thousand dollars ($15,000)," "fifty thousand dollars ($50,000)" for "thirty thousand dollars ($30,000)" and "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)" near the end of the second sentence.

Session Laws 1979, c. 832, s. 12, provides: "This act will not affect any policy in effect on the effective date of this act [Jan. 1, 1980] nor will this act affect pending litigation."

Section 13 makes this act effective January 1, 1980.

Cited in Travelers Ins. Co. v. Ryder Truck Rental, Inc., 34 N.C. App. 379, 238 S.E.2d 193 (1977); Engle v. State Farm Mut. Auto. Ins. Co., 37 N.C. App. 126, 245 S.E.2d 532 (1978).

§ 20-285. Regulation of motor vehicle distribution in public interest.

Quoted in Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978).

§ 20-288. Application for license; information required and considered; expiration of license; supplemental license; bond.

(e) Each applicant approved by the Division for license as a motor vehicle dealer, manufacturer, distributor branch, or factory branch shall furnish a corporate surety bond or cash bond or fixed value equivalent thereof in the principal sum of fifteen thousand dollars ($15,000) and an additional principal sum of five thousand dollars ($5,000) for each additional place of business within this State at which motor vehicles are sold. Each application for a license or a renewal of a license shall be accompanied by a list of locations at which the applicant engages in the business of selling motor vehicles in this State. A corporate surety bond shall be approved by the Commissioner as to form and shall be conditioned that the obligor will faithfully conform to and abide by the provisions of this Article. A cash bond or fixed value equivalent thereof shall be approved by the Commissioner as to form and terms of deposits as will secure the ultimate beneficiaries of the bond; and such bond shall not be available for delivery to any person contrary to the rules of the Commissioner. Any purchaser of a motor vehicle who shall have suffered any loss or damage by any act of a motor vehicle dealer that constitutes a violation of this Article shall have the right to institute an action to recover against such motor vehicle dealer and the surety. Every licensee against whom such action is instituted shall notify the Commissioner of the action within 10 days after process is served on the licensee. A corporate surety bond shall remain in force and effect and may not be canceled by the surety unless the motor vehicle dealer, manufacturer, distributor branch, or factory branch has terminated the operations of its business nor unless its license has been denied, suspended, or revoked under G.S. 20-294. Such cancellation may be had only upon 30 days' written notice to the Commissioner and shall not affect any liability incurred or accrued prior to the termination of such 30-day period. Provided nothing herein shall apply to a motor vehicle dealer, manufacturer, distributor branch or factory branch which deals only in trailers having an empty weight of 4,000 pounds or less. (1955, c. 1243, s. 4; 1975, c. 716, s. 5; 1977, c. 560, s. 2; 1979, c. 254.)

Editor's Note. —

The 1979 amendment, effective July 1, 1979, added the last sentence to subsection (e).

As only subsection (e) was changed by the amendment, the other subsections are not set out.

ARTICLE 12.

Motor Vehicle Dealers and Manufacturers Licensing Law.

§ 20-305. Coercing dealer to accept commodities not ordered; threatening to cancel franchise; preventing transfer of ownership; granting additional franchises; terminating franchises without good cause; preventing family succession.

Subdivision (6) Is Constitutional. — The General Assembly reasonably concluded that subdivision (6) promotes the public welfare in an area vitally affecting the general economy of the State, and it is constitutional. Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978).

Subdivision (6) Does Not Unconstitutionally "Impair the Obligations of Contracts". — Subdivision (6) is not a state "law impairing the obligations of contracts" in the constitutional sense. Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978).

Subdivision (6) Does Not Unconstitutionally Take Property without Compensation. — Subdivision (6) does not involve any disturbance of essential or core expectations arising from contract or amount to a taking without compensation. Rather, it constitutes a reasonable exercise of the police power by the State in furtherance of the public welfare. Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978).

Subdivision (6) Is Not Unconstitutionally Retroactive. — Subdivision (6), which requires a filing of notice prior to termination of automobile franchise contracts, is not made unconstitutional by retroactive application to existing contracts. Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978).

Subdivision (6) Is Not an Ex Post Facto Law. — Although this Article provides criminal sanctions for violations of subdivision (6), its retroactive application to an existing contract does not constitute it an ex post facto law prohibited by the Constitution of the United States. U.S. Const., Art. I, § 10, cl. 1. That clause applies only in cases in which a crime is created or punishment for a criminal act is increased after the fact and does not speak to the effect of statutes passed after the fact when employed in civil cases. Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978).

The provisions of subdivision (6) are free from ambiguity, apply solely to unilateral franchise terminations by the manufacturer, and do not extend to mutual agreements between manufacturer and dealer to terminate a franchise. Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 296 N.C. 357, 250 S.E.2d 250 (1979).

Subdivision (6) Applies to Unilateral Action by Manufacturers, Not Mutual Agreements Between Manufacturer and Dealer. — In effect, the express language of subdivision (6) imposes substantial curbs on the unilateral actions of a manufacturer with respect to franchise termination. The express language does not cover voluntary mutual termination agreements between manufacturer and dealer. Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 296 N.C. 357, 250 S.E.2d 250 (1979).

Voluntariness of Termination Irrelevant to Question of Notice to Commissioner. — Subdivision (6) specifically commands that the Commissioner of Motor Vehicles be given the required notice prior to termination or expiration of an automobile dealership franchise. Failure to give the required notice prior to termination or expiration is specifically declared to be unlawful. The voluntariness of such agreements is irrelevant. Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978).

ARTICLE 14.

Driver Training School Licensing Law.

§ 20-320. Definitions.

Amendment Effective Jan. 1, 1981. — Session Laws 1979, c. 667, s. 39, effective Jan. 1, 1981, will amend subdivision (1) to read as follows:

"(1) 'Commercial driver training school' or 'school' means a business enterprise conducted by an individual,

association, partnership or corporation which educates or trains persons to operate or drive motor vehicles or which furnishes educational materials to prepare an applicant for an examination given by the State for a driver's license or learner's permit, and charges a consideration or tuition for such service or materials."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

ARTICLE 15.

Vehicle Mileage Act.

§ 20-343. Unlawful change of mileage. — It is unlawful for any person or his agent to disconnect, reset, or alter the odometer of any motor vehicle with the intent to change the number of miles indicated thereon. Whenever evidence shall be presented in any court of the fact that an odometer has been reset or altered to change the number of miles indicated thereon, it shall be prima facie evidence in any court in the State of North Carolina that the resetting or alteration was made by the person, firm or corporation who held title or by law was required to hold title to the vehicle in which the reset or altered odometer was installed at the time of such resetting or alteration or if such person has more than 20 employees and has specifically and in writing delegated responsibility for the motor vehicle to an agent, that the resetting or alteration was made by the agent. (1973, c. 679, s. 1; 1979, c. 696.)

Editor's Note. — The 1979 amendment, effective July 1, 1979, added the second sentence.

§ 20-348. Private civil action.

Intent to Defraud Essential to Action for Damages. — There must be more than a technical failure to comply in order to give rise to an action for damages under the Vehicle Mileage Act. The noncompliance must be accompanied by an intent to defraud. American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

ARTICLE 16.

Professional Housemoving.

§ 20-356. Definitions.

Editor's Note. — Section 18 of Session Laws 1977, c. 720, which enacted this Article, originally provided that the act should expire August 1, 1979. Session Laws 1979, c. 475, s. 2, effective August 1, 1979, amended Session Laws 1977, c. 720, s. 18, so as to eliminate the provision for expiration of the act.

§ 20-369. Out-of-state licenses and permits. — An out-of-state person, partnership, or corporation engaging in the structural moving business may apply to the Department for a license to engage in the housemoving profession in North Carolina, and obtain permits for moves by complying with the provisions of this Article and the regulations of the Department in the same

manner as is required of North Carolina residents and by showing that the state in which the housemover operates his business extends similar privileges to housemovers licensed in North Carolina. (1977, c. 720, s. 14; 1979, c. 475, s. 1.)

Editor's Note. — The 1979 amendment, effective August 1, 1979, added at the end of the section "and by showing that the state in which the housemover operates his business extends similar privileges to housemovers licensed in North Carolina."

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE
RALEIGH, NORTH CAROLINA

October 15, 1979

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1979 Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

RUFUS L. EDMISTEN
Attorney General of North Carolina